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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Volume 8
Issue 9

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... v

Table of Rulemaking Numbers..... vi

Table of Localities..... vii

Table by Subject Matter..... viii

Table by Statutory and Rule Provisions..... xii

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 2724

Table of Cases
Volume 8
Issue 9

Case Name	Page
AMSC Subsidiary Corporation	2871
AT&T Communications	2870
Amendment of Part 22 - License Renewals	2834
Amendment of Part 22 - Power Limits for Paging Stations	2796
Amendment of Part 74 - Use of Frequencies	2828
Amendment of Part 94 - Grandfathering Provisions	2801
Amendment of Parts 0, 1, 2, and 95 - Video Data Services	2787
Amendment of Parts 2 and 15 - Radio Scanners	2911
American Telegram Corporation	2822
American Telephone & Telegraph Co.	2821
American Telephone & Telegraph Co.	2823
Ameritech's Petition for Restructuring	2964
B.F. Investments, Inc.	2933
Baton Rouge MSA Limited Partnership	2889
Bell Atlantic Telephone Companies	2732
Bell Atlantic Telephone Companies	2843
Bishop, Donald W.	2847
Cable TV Act of 1992 - Broadcast Signal Carriage Issues	2965
Cable TV Act of 1992 - Customer Service Standards	2892
Cable TV Act of 1992 - Rate Regulation	2917
Cable TV Act of 1992 - Rate Regulation	2921
Chevron Industries, Inc.	2726
Concord-Carlisle Regional School District (WIQH)	2761
Consumer Federation of America	2919
Dial Page, Inc.	2724
Dial-A-Page, Inc.	2767
EMI Communications Corporation	2793
Edison Cellular	2736
Elgar Partnership	2873
Expansion of Privileges of Novice and Technician Operators	2819
Flanders, H. Gibbs, Jr.	2759
Fox Television Stations, Inc.	2872
GTE California Incorporated	2887
GTE California Incorporated	2885
GTE Hawaiian Telephone Co., Inc.	2791
GTE Mobilnet of Houston Limited Partnership	2728
Headliner Radio, Inc.	2962
Imagists	2763
InterMart Broadcasting Gulf Coast, Inc.	2937
Jim Rogers/Washington Telecom Week	2920
Line of Site, Inc.	2826
Local Exchange Carrier Line Information Database	2957
Long Distance Service of Washington, Inc.	2794

Case Name	Page
Low Power Television Service	2770
MCI Telecommunications Corp.	2824
Mid-Coast Radio Project, Inc.	2942
Naleszkiewicz, Nancy	2777
National Exchange Carrier Association	2930
Operator Services Access and Pay Telephone Compensation	2863
Pizano, Roberto	2752
Price, David R.	2960
Profit Enterprises, Inc.	2846
Radio Telecom and Technology, Inc.	2730
Radiofrequency Radiation Exposure Guidelines	2849
Reminder of Waiver Termination Date for Bridge Crane Users	2820
Satellite Cable Programming Encryption Technology Report	2925
See, Merrill T.	2756
Shain, Honus	2757
Stokes Communications Corporation	2963
Table of Allotments, FM, Allouez and Sheboygan Falls, WI	2809
Table of Allotments, FM, Berlin, De Forest and Wautoma, WI	2747
Table of Allotments, FM, Broken Bow, OK	2875
Table of Allotments, FM, Buckeye, AZ	2807
Table of Allotments, FM, Campbellsville and Mannsville, KY	2880
Table of Allotments, FM, Cleveland and Ebenezer, MS	2739
Table of Allotments, FM, Greenwood, MS	2815
Table of Allotments, FM, Hali'imaile, HI	2947
Table of Allotments, FM, Henderson, TX	2884
Table of Allotments, FM, Homerville, Lakeland and Statenville, GA	2953
Table of Allotments, FM, Howe, TX	2750
Table of Allotments, FM, Kahalu'u, HI	2949
Table of Allotments, FM, Leesburg and Tavares, FL	2817
Table of Allotments, FM, Marlboro, VT	2943
Table of Allotments, FM, Minetto, NY	2813
Table of Allotments, FM, Moberly, MO	2745
Table of Allotments, FM, Newport, OR	2882
Table of Allotments, FM, Norway, MI	2743
Table of Allotments, FM, Pelham, GA	2811
Table of Allotments, FM, Reedsport, OR	2805
Table of Allotments, FM, Rushford, MN	2741
Table of Allotments, FM, Seminole, OK	2790
Table of Allotments, FM, Starbuck, MN	2804
Table of Allotments, FM, Thief River Falls and Walker, MN	2944
Table of Allotments, FM, Trenton, FL	2951
Table of Allotments, TV, Albion, Lincoln and Columbus, NE	2876
Texas Wired Music, Inc.	2935
US West Communications, Inc.	2924
US West, Inc.	2961
Video, 44	2753
Wilmshurst, Richard	2734

Table of Cases by Delegated Authority and FCC Number

Volume 8
Issue 9

Delegated Authority or FCC Number	Page
DA 93 - 345	2885
DA 93 - 346	2887
DA 93 - 353	2747
DA 93 - 356	2750
DA 93 - 363	2741
DA 93 - 364	2743
DA 93 - 365	2745
DA 93 - 366	2739
DA 93 - 371	2811
DA 93 - 373	2804
DA 93 - 374	2809
DA 93 - 380	2813
DA 93 - 382	2815
DA 93 - 389	2734
DA 93 - 395	2736
DA 93 - 398	2790
DA 93 - 404	2805
DA 93 - 405	2807
DA 93 - 411	2884
DA 93 - 413	2817
DA 93 - 414	2880
DA 93 - 415	2876
DA 93 - 417	2757
DA 93 - 418	2759
DA 93 - 420	2882
DA 93 - 421	2875
DA 93 - 428	2761
DA 93 - 433	2943
DA 93 - 436	2944
DA 93 - 439	2947
DA 93 - 440	2949
DA 93 - 441	2951
DA 93 - 442	2724
DA 93 - 443	2726
DA 93 - 445	2953
DA 93 - 446	2935
DA 93 - 449	2843
DA 93 - 450	2791
DA 93 - 451	2793
DA 93 - 452	2794
DA 93 - 454	2826
DA 93 - 458	2872
DA 93 - 459	2870
DA 93 - 460	2819
DA 93 - 461	2871
DA 93 - 462	2820
DA 93 - 463	2919
DA 93 - 468	2889
DA 93 - 469	2924
DA 93 - 470	2821
DA 93 - 471	2822
DA 93 - 472	2823
DA 93 - 473	2824
DA 93 - 476	2930
DA 93 - 480	2933
DA 93 - 481	2964
DA 93 - 484	2962
DA 93 - 485	2961
DA 93 - 486	2963
DA 93 - 487	2942
FCC 93 - 138	2863
FCC 93 - 139	2834
FCC 93 - 142	2849
FCC 93 - 144	2965
FCC 93 - 145	2892
FCC 93 - 150	2846
FCC 93 - 151	2847
FCC 93 - 157	2730
FCC 93 - 158	2752
FCC 93 - 166	2767
FCC 93 - 167	2728
FCC 93 - 175	2925
FCC 93 - 176	2921
FCC 93 - 180	2753
FCC 93 - 182	2732
FCC 93 - 183	2828
FCC 93 - 185	2917
FCC 93 - 187	2770
FCC 93 - 188	2796
FCC 93 - 189	2801
FCC 93 - 192	2873
FCC 93 - 193	2756
FCC 93 - 194	2920
FCC 93 - 196	2763

Delegated Authority or FCC Number	Page
FCC 93 - 197	2787
FCC 93 - 200	2957
FCC 93 - 201	2911
FCC 93 - 208	2960
FCC 93R - 13	2937
FCC 93R - 14	2777

Table of Cases by Docket Number
Volume 8
Issue 9

Docket Number	Page
CC Dkt.No.90 - 358	2834
CC Dkt.No.90 - 591	2777
CC Dkt.No.91 - 35	2863
CC Dkt.No.93 - 116	2796
CC Dkt.No.93 - 123	2930
ET Dkt.No.93 - 1	2911
ET Dkt.No.93 - 62	2849
GEN Dkt.No.91 - 2	2787
MM Dkt.No.83 - 575	2753
MM Dkt.No.85 - 331	2763
MM Dkt.No.90 - 106	2937
MM Dkt.No.90 - 214	2953
MM Dkt.No.90 - 544	2944
MM Dkt.No.91 - 136	2960
MM Dkt.No.91 - 304	2876
MM Dkt.No.92 - 226	2790
MM Dkt.No.92 - 228	2809
MM Dkt.No.92 - 231	2943
MM Dkt.No.92 - 233	2880
MM Dkt.No.92 - 252	2817
MM Dkt.No.92 - 259	2965
MM Dkt.No.92 - 263	2892
MM Dkt.No.92 - 266	2917
MM Dkt.No.92 - 266	2921
MM Dkt.No.92 - 277	2875
MM Dkt.No.92 - 301	2884
MM Dkt.No.92 - 315	2804
MM Dkt.No.93 - 91	2747
MM Dkt.No.93 - 92	2750
MM Dkt.No.93 - 97	2743
MM Dkt.No.93 - 98	2741
MM Dkt.No.93 - 99	2745
MM Dkt.No.93 - 100	2739
MM Dkt.No.93 - 101	2811
MM Dkt.No.93 - 103	2813
MM Dkt.No.93 - 104	2815
MM Dkt.No.93 - 106	2828
MM Dkt.No.93 - 109	2757
MM Dkt.No.93 - 110	2759
MM Dkt.No.93 - 111	2805
MM Dkt.No.93 - 112	2807
MM Dkt.No.93 - 113	2882
MM Dkt.No.93 - 114	2770
MM Dkt.No.93 - 115	2761
MM Dkt.No.93 - 117	2949
MM Dkt.No.93 - 118	2951
MM Dkt.No.93 - 119	2947
PP Dkt.No.92 - 234	2925
PR Dkt.No.90 - 260	2801

Table of Cases by Rulemaking Number
Volume 8
Issue 9

Rulemaking Number	Page
RM - 6196	2787
RM - 7101	2953
RM - 7226	2953
RM - 7527	2944
RM - 7615	2944
RM - 7772	2770
RM - 7787	2876
RM - 8016	2965
RM - 8076	2943
RM - 8078	2880
RM - 8079	2809
RM - 8082	2790
RM - 8093	2819
RM - 8099	2817
RM - 8112	2875
RM - 8136	2884
RM - 8141	2804
RM - 8175	2739
RM - 8197	2747
RM - 8201	2811
RM - 8202	2745
RM - 8203	2743
RM - 8204	2805
RM - 8205	2750
RM - 8206	2813
RM - 8207	2741
RM - 8209	2815
RM - 8210	2807
RM - 8212	2882
RM - 8214	2949
RM - 8215	2947
RM - 8219	2951
RM - 8221	2919

Table of Cases by City
Volume 8
Issue 9

City/ State	Page
Albion, NE	2876
Allouez, WI	2809
Austin, TX	2935
Baton Rouge, LA	2889
Berlin, WI	2747
Broken Bow, OK	2875
Buckeye, AZ	2807
Campbellsville, KY	2880
Chicago, IL	2753
Cleveland, MS	2739
Columbus, NE	2876
Concord, MA	2761
Conroe, TX	2763
Danville, KY	2757
De Forest, WI	2747
Ebenezer, MS	2739
Galveston, TX	2728
Greenwood, MS	2815
Hali'imaile, HI	2947
Henderson, TX	2884
Homerville, GA	2953
Houma, LA	2826
Howe, TX	2750
Jackson, MS	2960
Johnson City, TN	2933
Kahalu'u, HI	2949
Kansas City, MS	2942
Lakeland, GA	2953
Leesburg, FL	2817
Lincoln, NE	2876
Mannsville, KY	2880
Marlboro, VT	2943
Minetto, NY	2813
Moberly, MO	2745
Monrovia, CA	2846
Mount Wilson, CA	2885
Mt. Pleasant, TX	2767
New York, NY	2872
Newport, OR	2882
Norway, MI	2743
Oat Mountain, CA	2887
Overland Park, KS	2847
Pelham, GA	2811
Punta Rassa, FL	2937
Randolph Center, VT	2963
Reedsport, OR	2805
Rochester, NY	2793
Rushford, MN	2741
Seminole, OK	2790
Soperton, GA	2759
Starbuck, MN	2804
Statenville, GA	2953
Tampa, FL	2752
Tavares, FL	2817
Thief River Falls, MN	2944
Trenton, FL	2951
Walker, MN	2944
Wautoma, WI	2747

Table of Cases by Rulemaking Number
Volume 8
Issue 9

Rulemaking Number	Page
RM - 6196	2787
RM - 7101	2953
RM - 7226	2953
RM - 7527	2944
RM - 7615	2944
RM - 7772	2770
RM - 7787	2876
RM - 8016	2965
RM - 8076	2943
RM - 8078	2880
RM - 8079	2809
RM - 8082	2790
RM - 8093	2819
RM - 8099	2817
RM - 8112	2875
RM - 8136	2884
RM - 8141	2804
RM - 8175	2739
RM - 8197	2747
RM - 8201	2811
RM - 8202	2745
RM - 8203	2743
RM - 8204	2805
RM - 8205	2750
RM - 8206	2813
RM - 8207	2741
RM - 8209	2815
RM - 8210	2807
RM - 8212	2882
RM - 8214	2949
RM - 8215	2947
RM - 8219	2951
RM - 8221	2919

Table of Cases by City
Volume 8
Issue 9

City/ State	Page
Albion, NE	2876
Allouez, WI	2809
Austin, TX	2935
Baton Rouge, LA	2889
Berlin, WI	2747
Broken Bow, OK	2875
Buckeye, AZ	2807
Campbellsville, KY	2880
Chicago, IL	2753
Cleveland, MS	2739
Columbus, NE	2876
Concord, MA	2761
Conroe, TX	2763
Danville, KY	2757
De Forest, WI	2747
Ebenezer, MS	2739
Galveston, TX	2728
Greenwood, MS	2815
Hali'imaile, HI	2947
Henderson, TX	2884
Homerville, GA	2953
Houma, LA	2826
Howe, TX	2750
Jackson, MS	2960
Johnson City, TN	2933
Kahalu'u, HI	2949
Kansas City, MS	2942
Lakeland, GA	2953
Leesburg, FL	2817
Lincoln, NE	2876
Mannsville, KY	2880
Marlboro, VT	2943
Minetto, NY	2813
Moberly, MO	2745
Monrovia, CA	2846
Mount Wilson, CA	2885
Mt. Pleasant, TX	2767
New York, NY	2872
Newport, OR	2882
Norway, MI	2743
Oat Mountain, CA	2887
Overland Park, KS	2847
Pelham, GA	2811
Punta Rassa, FL	2937
Randolph Center, VT	2963
Reedsport, OR	2805
Rochester, NY	2793
Rushford, MN	2741
Seminole, OK	2790
Soperton, GA	2759
Starbuck, MN	2804
Statenville, GA	2953
Tampa, FL	2752
Tavares, FL	2817
Thief River Falls, MN	2944
Trenton, FL	2951
Walker, MN	2944
Wautoma, WI	2747

Subject Index
Volume 8
Issue 9

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Integration of ownership into management, quantitative aspect	2937
Orders or Notices	
Lottery to select licensee	2761
Amateur Radio Service (ARS)	
ARS - Aliens, operation of station by	
Alien amateur to operate a station in the U.S., permission for an	2819
Broadcast Radio Services - General Rules	
Applications	
Call sign assignments, provisions re request for new/modified	2770
Applications for authorization	
Acceptance of applications, procedure for	2770
Amendment of applications	2763
Public inspection file of noncommercial stations, local	2942
TV, low power TV, TV translator stations applications: processing	2770
Licenses and permits	
Multiple ownership of broadcast stations in the same service	2872
Operating hours	
Discontinuation	2757, 2759
Schedule	2757, 2759
Unauthorized time	2963
Program contents	
Contests	2962
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	2747, 2750, 2741, 2743 2745, 2739, 2804, 2790 2813, 2815, 2817, 2884 2875, 2943, 2944, 2880 2882, 2947, 2949, 2951 2953, 2805, 2807, 2811

Subject	Page
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	2876
Cable Television Service	
Markets and services	
Cable signals in sites outside major and smaller markets	2965
Carriage of TV stations by qualified cable systems, mandatory	2965
Carriage of a cable system, disputes concerning	2965
Rules	
Waiver by Commission of any provision	2965
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	2791, 2794, 2793
Commission Organization	
Common Carrier Bureau	
Functions: recommend/administer policies for services for hire	2734
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	2734, 2870
Communications Act of 1934	2734,2921
Common Carriers	
Extension of lines, certificate for	2791, 2794, 2793
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	2846, 2847, 2752, 2962 2963
Radio, provisions relating to	
License for radio communication or transmission of energy	2846, 2847, 2752
Sanctions, administrative	2846, 2752, 2757, 2759
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Defective applications	2826, 2933
Requirements, general application	2826, 2933
Applications and licenses, processing	
Consideration of applications, proceedings in	2933
Dismissal and return	2826, 2933
Multipoint distribution service	
Frequency interference	2935

Subject	Page
Frequency Allocations and Radio Treaty Matters	
Equipment authorization procedures: certification	
Application for certification, contents of and form for	2911
Equipment authorization procedures: notification	
Authorization based on notification procedure	2911
Operational-Fixed Microwave Service, Private	
Technical standards	
Frequencies available, tables of assignments of	2801
Personal Radio Services: GMRS, R/C, CB	
R/C - rules for operation of a system	
Channels/frequencies available, list of	2820
Practice and Procedure	
National Environmental Policy Act of 1969: procedures	
Actions with environmental effect and environmental assessments	2849
Proceedings, miscellaneous	
Forfeiture proceedings	2752, 2767, 2887, 2885
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	2763, 2957
Reconsideration of a final FCC action, petition for	2728, 2933, 2960
Rulemaking proceedings: petitions	
Petitions	2819
Rulemaking proceedings: proceedings	
Date of rules, effective	2917, 2921
Reconsideration, petitions for	2863
Public Mobile Service	
Applications and licenses-filing requirements	
Forms and permissive changes or minor modifications	2767, 2887, 2885
Applications and licenses-processing	
Construction, time period allowed for	2767
Domestic public cellular radio telecommunications service	
Permissible communications	2889
General information	
Definitions	2889
Public land mobile service	
Antenna height and erp limit	2796
Base stations by antenna height and erp, classification of	2796
Co-channel stations, milage separation provisions for	2796
Erp for various stations	2796
Reliable service area for a two-way communications service	2796

Subject	Page
Technical standards	
Transmitters, no unauthorized access to	2796
Radio Frequency Devices	
Administrative provisions	
Equipment for testing, submission of	2911
Lowpower specific devices: control and security alarms	
Technical standards	2730
Lowpower specific devices: cordless telephones	
Non-interference, requirement for	2730
Special Broadcast Services	
Low power TV and TV translator stations	
Frequencies, protection for	2770
Interference protection for low power and translator stations	2770
Station identification by call letters	2770

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.091 Functions of the Bureau	2734
000.291 Authority Delegated	2734
000.291 Delegated Authority	2870
000.291 Delegated Authority	2871
001.080 Forfeiture proceedings.	2767
001.080 Forfeiture proceedings.	2885
001.080 Forfeiture proceedings.	2887
001.106 Petition For Reconsideration	2960
001.106 Petitions for reconsideration	2728
001.106 Petitions for reconsideration	2826
001.106 Petitions for reconsideration	2933
001.106(b)(1) petitions for reconsideration	2736
001.115 Application for Review	2732
001.115 Application for Review of Action	2763
001.1307 Actions which may have a significant environmental	2849
001.401 Petitions for rulemaking	2819
001.427 Effective Date of Rules	2917
001.427 Effective Date of Rules	2921
001.429 Petitions for Reconsideration	2863
001/1107 Payment of charges	2873
002.1033 Application for certification.	2911
002.975 Application for notification.	2911
015.037 Transition provisions for compliance with the rules.	2911
015.121 Scanners & frequency converters used with scanners.	2911
015.205 Two-way wireless digital radio system	2730
015.237 Operation in the bands 407-806 MHz and 216-220 MHz	2730
021.013(c) Additional application information submission	2826
021.013(c) Additional application information submission	2933
021.020(d) Dismissal for failure to timely submit informatio	2826
021.020(d) Dismissal for failure to timely submit informatio	2933
021.028(d) Dismissal for failure to prosecute	2826
021.028(d) Dismissal for failure to prosecute	2933
021.032 Consideration of applications	2826
021.032 Consideration of applications	2933
021.902(a) Frequency interference.	2935
022.002 defination of Roamers	2889
022.009 Standard application forms and permissive changes or	2767
022.009 Standard Application Forms.	2885
022.009 Standard Application Forms.	2887
022.043 Period of construction	2767
022.117 (Transmitters)	2796
022.502 (Classification or base stations)	2796
022.503 (Geographic separation of co-channel stations)	2796
022.504 (Reliable Service Area)	2796
022.505 (Antenna height-power limit)	2796
022.506 (Power)	2796
022.911(b) service to roamers	2889
022.941 Criteria for comparative cellular renewal proceeding	2834
022.942 Procedures for comparative renewal proceedings.	2834
032.016 Changes in accounting standards	2961

063.001 Contents of Application 2794
063.001 Contents of Application 2821
063.001 Contents of Application 2822
063.001 Contents of Application 2823
063.001 Contents of Applications 2791
063.001 Contents of Applications 2793
065.600(d)(1) Rate of Return Reports 2843
073.1216 Licensee conducted contests 2962
073.1740 Minimum operating schedule 2757
073.1740 Minimum operating schedule 2759
073.1745 Unauthorized Operation 2963
073.1750 Discontinuance of operation 2757
073.1750 Discontinuance of operation 2759
073.202 FM Table of Allotments 2739
073.202 FM Table of Allotments 2741
073.202 FM Table of Allotments 2743
073.202 FM Table of Allotments 2745
073.202 FM Table of Allotments 2747
073.202 FM Table of Allotments 2750
073.202 FM Table of Allotments 2790
073.202 FM Table of Allotments 2804
073.202 FM Table of Allotments 2805
073.202 FM Table of Allotments 2807
073.202 FM Table of Allotments 2809
073.202 FM Table of Allotments 2811
073.202 FM Table of Allotments 2813
073.202 FM Table of Allotments 2815
073.202 FM Table of Allotments 2817
073.202 FM Table of Allotments 2875
073.202 FM Table of Allotments 2880
073.202 FM Table of Allotments 2882
073.202 FM Table of Allotments 2884
073.202 FM Table of Allotments 2943
073.202 FM Table of Allotments 2944
073.202 FM Table of Allotments 2947
073.202 FM Table of Allotments 2949
073.202 FM Table of Allotments 2951
073.202 FM Table of Allotments 2953
073.3522(b) Amendment of Applications 2763
073.3527 Local public inspection file of noncom. stations 2942
073.3550 Requests for New or Modified Call Sign Assignments 2770
073.3555 Multiple Ownership DA 93-458 2872
073.3564 Acceptance of Applications 2770
073.3572 Processing of TV B/C LPTV TV Translator FCC 93-187 2770
073.606 TV Table of Allotments 2876
074.705 TV Broadcast Station Protection 2770
074.707 LPTV and TV Translator Station Protection 2770
074.783 Station Identification 2770
074.902 - Frequency Assignments 2828
074.931 - Purpose and Permissible Service 2828
074.932 - Eligibility and Licensing Requirements, FCC 93-183 2828
075.500 Definitions 2965
075.510 Major television markets 2965
076.1090 Temporary Freeze of Cable Rates 2917

076.1090 Temporary Freeze of Cable Rates 2921
076.300 Scope of applications 2965
076.302 Required record keeping for must-carry purposes 2965
076.309 Customer Service Obligations 2892
076.550 Definitions applicable to the must-carry rules 2965
076.560 Signal carriage obligations 2965
076.570 Channel positioning 2965
076.580 Notification 2965
076.590 Modification of television markets 2965
076.600 Compensation for carriage 2965
076.610 Disputes concerning carriage 2965
076.620 Manner of carriage 2965
076.640 Retransmission consent 2965
076.700 Special relief and must-carry complaints 2965
076.920 Network non-duplication; extent of protection 2965
094.65 Frequencies 2801
095.207 (R/C Rule 7) On what channels may I operate 2820
095.813 Eligibility 2787
095.815 License Application 2787
097.301 Authorized frequency bands 2819
300.154 Provisions Relating to the Commission 2734
300.154 Provisions Relating to the Commission 2921
300.203 Schedules of Charges 2732
300.204 Hearing as to Lawfulness 2732
300.214 Extension of Lines 2791
300.214 Extension of Lines 2793
300.214 Extension of Lines 2794
300.214 Extension of Lines 2821
300.214 Extension of Lines 2822
300.214 Extension of Lines 2823
300.214 Extension of Lines 2824
300.302(b), 2.803, 15.3, 15.101 2846
300.309 Action upon applications; form and conditions attach 2753
300.312 Administrative Sanctions 2757
300.312 Administrative Sanctions 2759
300.503(b) Forfeitures (Memorandum Opinion and Order) 2962
300.503(b) Forfeitures (Notice of Apparent Liability) 2963
300.543 Regulation of Rates 2917
300.543 Regulation of Rates 2921
400.05552 Public Information; agency rules, opinions, order, ... 2756
400.05552 Public Information; agency rules, opinions, order, ... 2920
400.181464 Broadcasting obscene language 2753
47 C.F.R. Section 0.291 Delegated Authority 2924
47 C.F.R. Section 1.115; App. for Review 2957
47 U.S.C. Section 201(b) 2930
500.100 2761
500.3035 Integration of Ownership Into Management, Quantitat 2937
500.3125 Misrepresentation and lack of candor 2777
500.3170 Financial Qualifications 2937
Contents of Applications 2824
Forfeiture Proceeding 300.503(b), 1.80 2846
Forfeiture Proceeding, 300.503(b), 1.80 2752
Forfeiture Proceeding, 300.503(b), 1.80 2847
Unlicensed Station 300.301, 300.312 2752

Unlicensed Station 300.301, 300.312 2847

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request of Dial Page, Inc.
To Waive Sections 90.621(a)(iv)
90.621(b), 90.627, 90.631(e) and
90.631(f) of the Commission's
Rules to Operate a Wide-Area
800 MHz Digital Trunked SMR

ORDER

Adopted: April 12, 1993; Released: April 19, 1993

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

1. On June 22, 1992 Dial Page, L.P.[1] (Dial Page) filed a request to waive the above-captioned Sections of the Commission's rules to implement a wide-area 800 MHz digital trunked Specialized Mobile Radio (SMR) system covering all or part of nine southeastern States. This waiver request was placed on public notice, with initial deadlines of September 30, 1992 for comments and October 19, 1992 for reply comments.[2] Several Orders granting extensions of time to file comments and reply comments were issued.[3] Comments were filed by the Bell Atlantic Metro Mobile Companies (BAMS), Cellcall, Inc. (Cellcall), the National Association of Business and Educational Radio, Inc. (NABER), and the National Association of Regulatory Utility Commissioners (NARUC). Reply Comments were filed by Cellcall, the Council of Independent Communication Suppliers (CICS), Dial Page, NABER and PowerSpectrum, Inc. (PSI). Except for Dial Page, all entities filing comments and reply comments opposed Dial Page's waiver request.

2. Before Dial Page submitted this waiver request, it had already filed 82 applications for 82 separate SMR stations at 82 distinct sites requesting only 5 channels at each site. By this waiver request Dial Page intended to amend each of these 82 applications to request 40 channels at each site and to integrate all 82 stations into a single wide area SMR system. By the time Dial Page filed its waiver request, however, at least 67 of these 82 applications had already been granted. Because Dial Page could not amend applications that had already been granted, it later filed 82 additional applications to increase the number of channels at each site from 5 to 40.

3. On December 2, 1992 Dial Page filed an Amendment to Request for Waiver "to accommodate the concerns expressed by parties commenting on the proposed waiver."[4] By this amendment Dial Page declared that it was voluntarily withdrawing the 82 follow-up applications it had filed for the additional 35 channels at each site.[5] Concomitantly, Dial Page withdrew its request to waive Sections 90.621(a)(1)(iv) and 90.627 of the Commission's Rules[6] to permit authorization of 40 channels at each site. Dial Page also withdrew its request to waive Section 90.621(b) of the Commission's Rules.[7] The only waiver request remaining after Dial Page's December 2, 1992 submission was its request to waive Sections 90.631(e) and (f) of the Commission's Rules[8] to permit more than the normal one-year construction period for each of the 82 5-channel SMR systems. On March 17, 1993 this waiver request was granted on the basis that Dial Page is constructing a large infrastructure of significant technical and logistical complexity.[9] [10]

4. Dial Page's withdrawal of various applications and requests for waiver removed from consideration those issues that had initially caused us to seek public comment on this matter, and the Private Radio Bureau has granted Dial Page's request for waiver of Sections 631(e) and (f) of the Commission's Rules, 47 C.F.R. §§ 631(e) and (f).[11] We therefore find that this proceeding IS MOOT. ACCORDINGLY, pursuant to the provisions of Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331, IT IS ORDERED that this proceeding IS TERMINATED.

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[1] On November 13, 1992 Dial Page completed a series of transactions whereby Dial Page, L.P., a South Carolina limited partnership, was converted to Dial Page, Inc., a Delaware corporation.

[2] Public Notice, 57 Fed. Reg. 39684 (September 1, 1992).

[3] Order, DA 92-1345 (September 30, 1992); Order, DA 92-1442 (October 20, 1992); Order, DA 92-1643 (December 4, 1992).

[4] Amendment to Request for Waiver filed by Dial Page at 2.

[5] The applications to be voluntarily withdrawn were the following: file numbers 608034-608043, 608046-608109, 609319-609320 and 609330-609335.

[6] 47 C.F.R. §§ 90.621(a)(1)(iv) and 90.627.

[7] This rule, 47 C.F.R. § 90.621(b), provides that the ordinary separation between co-channel SMR stations is 113 kilometers (70 miles).

[8] 47 C.F.R. §§ 90.631(e) and (f).

[9] Letter from Terry L. Fishel, Chief, Land Mobile Branch to Messrs. Gerald S. McGowan, Esquire and George L. Lyon, Jr., Esquire dated March 17, 1993. This waiver applies to the following SMR systems: WNZJ593-595, WNZJ597-599, WNZJ601-603, WNZJ605-607, WNZJ609-611, WNZJ613-615, WNZJ617-619, WNZJ621-623, WNZJ625-626, WNZJ629-630, WNZJ633-634, WNZJ637-638, WNZJ641-642, WNZJ645-646, WNZJ649, WNZJ654, WNZJ657-658, WNZJ661-662, WNZK835, WNZQ377, WNZQ381, WNZQ385, WNZQ389, WNZQ393, WNZQ397, WNZQ401, WNZQ405, WNZQ409, WNZQ413, WNZQ417, WNZQ421, WNZQ425, WNZQ429, WNZQ436, WNZQ440, WNZQ444, WNZQ448, WNZQ452, WNZQ456, WNZQ460, WNZQ464, WNZQ468, WNZQ650, WNZQ653, WNZV932, WNZW761, WNZW765, WPAI835-836 and WPAI944. It also applies to any licenses that would be granted as a result of the following pending applications: file numbers 583985, 584033, 584034, 584049, 584051, 584052, 584053, 584060 and 604317.

[10] See, *e.g.*, Memorandum Opinion and Order, File No. W-2667, 4 FCC Rcd 3802 (1989).

[11] Specifically, Dial Page no longer seeks waiver of Sections 90.621(a)(iv), 90.621(b) and 90.627 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	
CHEVRON	File Nos. 1069-DSE-P/L-92
INDUSTRIES, INC.	1070-DSE-P/L-92
	1071-DSE-MP/L-92
	1072-DSE-MP/L-92
Application to Modify	1073-DSE-MP/L-92
VSAT Network	1074-DSE-MP/L-92
	1075-DSE-MP/L-92

ORDER AND AUTHORIZATION

Adopted: April 12, 1993; Released: April 19, 1993

By the Chief, Domestic Facilities Division:

1. Chevron Industries, Inc. (Chevron) has filed seven related applications to modify its very small aperture antenna (VSAT) network. The package of applications proposes to increase the number of VSATs in the system from 5,000 to 5,860. Chevron also seeks authority to operate 40 VSATs in the Alaskan Panhandle[1] in conjunction with Canada's ANIK E-1 satellite. No comments were filed. For the reasons discussed below, Chevron's applications are granted.

2. Chevron filed two applications for blanket authority to operate 500 new .75 meter and 230 new 1.25 meter VSAT antennas. Three applications were filed to increase the number of 1.0 meter, 1.8 meter, and 2.4 meter VSATs already licensed to Chevron under call signs E900691, E900690, and E900689, respectively, from 5,000 to 5,130. Chevron also filed two applications to modify the hubs, call signs E900688 and E910178, to incorporate the .75 meter and 1.25 meter VSAT antennas. In each of these applications, Chevron seeks limited authority to operate its 40 VSATs located in the Alaskan Panhandle in conjunction with the Canadian Anik E-1 satellite.

DISCUSSION

3. The Commission generally requires domestic satellite providers to use domestic space station facilities to provide service. We have, however, in certain circumstances permitted U.S. providers to access other countries' satellites to provide domestic service. Pursuant to an exchange of letters between the U.S. and Canada, circumstances were identified where it would be in the interest of both countries not to preclude domestic satellite telecommunication systems from providing assistance to the other. One of these circumstances is the temporary shortage of adequate domestic facilities.[2] Thus, to gain access to a Canadian satellite, a domestic applicant must demonstrate that there are no domestic facilities available able to meet the applicant's needs.

4. Chevron states that the proposed Alaskan Panhandle operations using Anik E-1 will be entirely consistent with the Commission's policies. Chevron states that there are no compatible domestic satellites able to meet the needs of Chevron's data exchange network.[3] While the footprint of certain domestic transponders covers the Alaskan Panhandle, Chevron asserts that these transponders cannot be used because there are no corresponding ground facilities available. Chevron states that there are no domestic satellite transponders that both host Hughes Network Systems-Integrated Satellite Business Networks (HNS-ISBN), essential to Chevron's data exchange system, and provide adequate coverage to the Alaskan Southern Panhandle.[4] In addition, Chevron asserts that it will include U.S. domestic satellites in the second hop of a "double hop" transmission. Specifically, Chevron's VSATs in the Alaskan Panhandle will uplink to Anik E-1, which will downlink to a Telesat Canada hub located in Toronto. The data will then be uplinked to a U.S. domestic satellite and downlinked to Chevron's hub.

5. We believe that Chevron's use of Anik E-1 is consistent with the exchange of letters between the U.S. and Canada. Chevron has demonstrated sufficient need for cross-border authority due to the lack of compatible domestic transponders. We also recognize that U.S. domestic satellites will provide the space segment of the second hop in the communications path.

6. Increasing the number of VSAT antennas as well as diversifying antenna size will serve the public interest by allowing Chevron to better serve its customers. Thus, Chevron is granted authority to increase the number of remote

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[1] The Alaskan Panhandle is located between 54^0 and 60^0 North latitude and between 130^0 and 138^0 West longitude.

[2] *See* letter from K.B. Williamson and F.G. Nixon, Canadian Department of Communications to Bertram W. Rein, U.S. Department of State (November 6, 1972). *See also* letter from Bertram W. Rein, U.S. Department of State to K.B. Williamson, Canadian Department of Communications (November 7, 1972). *See* letter from Allan Gotlieb, Ambassador of Canada to Robert Hormats, U.S. Department of State (August 24, 1982). *See also* letter from Robert Hormats, U.S. Department of State to Allan Gotleib, Ambassador of Canada (August 24, 1982) (exchange of letters). The exchange of letters outlines the principles which govern the provision of transborder fixed satellite telecommunication services between the U.S. and Canada.

[3] Chevron's data exchange network interconnects VSATs located at Chevron's gasoline service stations and at its gasoline distribution centers with a hub at Chevron's central headquarters in San Ramon, California. Within this system, Chevron automatically monitors the flow of gasoline from distribution center storage tanks into gasoline tank trucks so that headquarters is able to coordinate the replenishment of the storage tanks. At the service stations, the system performs data services critical to the stations' day-to-day operations.

[4] In theory, there are other VSAT networks which could be modified to communicate with Chevron's VSAT stations in the Alaskan Panhandle. Hartmarx Specialty Stores, Inc. and GTE, Inc. are specifically in the business of providing shared facilities for other users. However, according to Chevron, expansion of the shared facilities to accommodate Chevron outlets in the Alaskan Southern Panhandle would require investments in IF/baseband as well as RF equipment of $500,000 to $1,000,000. Chevron believes that these service providers would not be likely to make this investment in order to serve only 40 sites in Alaska.

VSATs operating within the existing VSAT network by 130 and construct and operate 230 additional 1.2 meter and 500 additional .75 meter VSAT antennas.

7. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that, Application File Numbers 1069-1070-DSE-P/L-92 and 1071-1075-DSE-MP/L-92 ARE GRANTED and Chevron Industries, Inc. IS AUTHORIZED TO construct and operate a total of 5,860 VSATs within its network including 40 VSATs in the Alaskan Panhandle which will operate in conjunction with Canada's Anik E-1 satellite.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

GTE MOBILNET OF HOUSTON LIMITED PARTNERSHIP — File No. 10018-CL-L-87

Notification of construction of facilities in the Domestic Public Cellular Telecommunications Service, Station KNKA459, on Frequency Block B, in Market 170, Galveston-Texas City, Texas MSA

ORDER ON RECONSIDERATION

Adopted: March 26, 1993; Released: April 19, 1993

By the Commission:

I. INTRODUCTION

1. The Mobile Services Division (MSD) issued an order permitting GTE Mobilnet of Houston Limited Partnership (GTE) to begin operating constructed cellular facilities in the Galveston-Texas City, Texas MSA. *See GTE Mobilnet of Houston Limited Partnership*, 2 FCC Rcd 2493 (Mobile Serv. Div. 1987). Petroleum Communications, Inc. (Petrocom), non-wireline licensee for the Gulf of Mexico Service Area (GMSA), has filed a petition for reconsideration. Petrocom argues that the MSD has erroneously granted GTE a service area extending into the Gulf of Mexico (Gulf). In this order, we find that Petrocom failed to timely raise its objections, and dismiss the petition.

II. BACKGROUND

2. On April 9, 1986, GTE filed an application to provide Block B cellular service in the Galveston, Texas MSA. The application proposed a Cellular Geographic Service Area (CGSA) which extended past the Galveston coastline and into the GMSA.[1] GTE's application was placed on public notice,[2] and no petitions to deny were filed. The application was granted on November 18, 1986.[3]

3. GTE completed construction at cell site No. 001-Galveston and filed the above-captioned notification of completion of construction on FCC Form 489. The Form 489 was listed on public notice,[4] and two parties filed petitions to defer.[5] Petrocom did not participate in these proceedings. On April 29, 1987 the MSD issued an order which disposed of the petitions to defer, thus permitting GTE to begin operating at the Galveston site. *See GTE Mobilnet*, 2 FCC Rcd at 2493. On May 29, 1987, Petrocom submitted the subject petition for reconsideration of the *GTE Mobilnet* decision.[6] Petrocom argues that the MSD has erred by granting GTE a service area extending into the Gulf. Petrocom also argues it will be harmed by the extension because it may lose customers and revenues to GTE in the extension area.

III. DISCUSSION

4. Under Section 1.106(b)(1) of the Commission's Rules,[7] a non-party filing a petition for reconsideration must show good reason why it was not possible to participate in the earlier stages of the proceeding. Petrocom argues that it had no reason to file a petition to deny against GTE's application because, at the time, the GMSA boundary was still being litigated. *See* note 1, *supra*. Petrocom also argues that it assumed the Commission would conform the boundary of any onshore MSAs to whatever boundary was finally adopted for the GMSA.

5. At the time GTE's original application was filed in April, 1986, the Bureau had already issued an order defining the boundary of the GMSA as the coastline. The fact that further proceedings were pending did not eliminate the need for Petrocom to examine GTE's application, and notify the Commission of any objections it might have in a timely filed petition to deny. Furthermore, the Commission's final decision on the GMSA boundary was issued

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[1] On August 14, 1985, the Common Carrier Bureau had granted an application filed by Petrocom to provide Block A cellular service in the Gulf, and established the coastline as the boundary of the GMSA. *Petroleum Communications, Inc.*, Mimeo No. 6337 (released Aug. 14, 1985). On November 7, 1986, while GTE's application was still pending, the Commission affirmed the Bureau's decision. *See Petroleum Communications, Inc.*, 1 FCC Rcd 511 (1986).

[2] *See* Public Notice Report No. CL-86-139 (released May 6, 1986).

[3] *See* Public Notice Report No. CL-87-55 (released Nov. 18, 1986).

[4] *See* Public Notice Report No. CL-87-116 (released Jan. 5, 1987).

[5] At the time of GTE's filing, the Commission placed a wireline carrier's initial Form 489 notification on public notice. This allowed the non-wireline carrier an opportunity to file a petition for deferral of operating authority under the "headstart" doctrine. *See Century Cellunet of Jackson MSA Ltd. Partnership*, 6 FCC Rcd 6150, 6152 n.2 (1991). The Commission has since eliminated the headstart policy and no longer allows petitions to defer. *See Rules for Unserved Areas*, 6 FCC Rcd 6185, 6225-26 (1991).

[6] GTE and Petrocom have been engaged in extensive settlement negotiations regarding this matter. On October 21, 1992, Petrocom advised the Commission that it would be unable to accept GTE's most recent settlement proposal.

[7] Section 1.106(b)(1) of the Rules states, in pertinent part, as follows:

> [A]ny party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it . . . shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

prior to the November, 1986 grant of GTE's application. Thus, Petrocom clearly could have raised its objections in a timely filed petition for reconsideration of the application grant.[8] Moreover, GTE's Form 489 notification was placed on public notice, and Petrocom did not file any objection to it.[9] We conclude that Petrocom has failed to show good reason why it was not possible to participate earlier, and that its petition is defective for failure to meet the requirements of Section 1.106(b)(1) of the Rules.

6. Furthermore, we find that the public interest does not require consideration of the matters raised in Petrocom's petition. *See* Section 1.106(c)(2) of the Rules. Because GTE and Petrocom operate on different frequency blocks, GTE's extension will not cause any co-channel electrical interference to Petrocom's system.[10] Although Petrocom argues that it may be harmed by loss of customers and revenues resulting from GTE's extension, Petrocom has failed to show how the public will be harmed by the extension. We conclude that Petrocom has failed to indicate an injury to the public sufficient to justify consideration of its post-grant petition.[11] *See Valley Telecasting Co., Inc. v. FCC*, 336 F.2d 914, 918-19 (D.C. Cir. 1964) (dismissal of petition for reconsideration upheld where arguments were untimely raised and there was no showing of serious injuy to the public). Accordingly, Petrocom's petition is dismissed for failure to meet the requirements of Section 1.106 of the rules.[12]

IV. ORDERING PARAGRAPH

7. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration, filed by Petroleum Communications, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[8] Petrocom also argues that a large number of cellular markets border on the GMSA, and that it would not be feasible for Petrocom to file objections against so many applications. However, there is nothing in the Commission's Rules which would relieve Petrocom of its obligation to file timely protests under the circumstances described. Furthermore, we find that reviewing applications from the neighboring markets, and filing petitions against those applications proposing Gulf extensions, would not impose any undue burden on Petrocom.

[9] Petrocom argues that the public notice was issued merely to permit petitions for deferral of operating authority, *see* note 5 *supra*, and did not provide Petrocom with notice of an opportunity for filing petitions to deny. We note that in the underlying decision, the MSD incorrectly stated that GTE had filed a license application. In fact, GTE filed an FCC Form 489, which is a notification, and not an application. *See* Section 22.9(b) of the Commission's Rules; *Public Mobile Services*, 95 FCC 2d 769, 774 (1983). Language to the contrary in the MSD order is hereby reversed, including the granting of "the application" ordering clause. Petitions to deny under Section 309(d) of the Communications Act of 1934, 47 U.S.C. § 309(d), may not be filed in response to a notice of the filing of a Form 489. *Century Cellunet of Jackson*, 6 FCC Rcd at 6151. However, given that petitions to defer were then permitted, Petrocom could have filed an informal request for Commission action under Section 1.41 of the Rules.

[10] Petrocom is assigned to operate on frequency block A; GTE is assigned to operate on frequency block B.

[11] In the absence of a general rulemaking proceeding, the original November, 1986 grant to GTE, even if an error, cannot be modified without following the procedures specified in Section 316 of the Act, 47 U.S.C. § 316. We do not find that the public interest requires such proceedings here.

[12] On August 25, 1992, RVC Services, Inc. d/b/a Coastel Communications Company (Coastel), the wireline licensee for the GMSA, filed a request to intervene in this proceeding, based on an application it had recently filed to provide cellular service off the Galveston coast. *See* File No. 04837-CL-MP-92. Because Coastel's application has been dismissed, *see* Letter from Chief, MSD to Coastel (dated Nov. 9, 1992) and Application for Review filed by Coastel on December 21, 1992, Coastel's request to intervene in this proceeding is dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Waiver of
Part 15 of the Commission's Rules
to operate a two-way wireless
digital radio system in the 407-806
and/or 216-220 MHz bands.

MEMORANDUM, OPINION AND ORDER

Adopted: March 19, 1993; Released: April 19, 1993

By the Commission:

INTRODUCTION

1. By this action, the Commission denies a petition filed by Radio Telecom and Technology, Inc. (RTT) seeking review of the Chief Engineer's denial of RTT's previously filed petition for waiver.[1] This action reaffirms a previous Commission decision not to consider additional provisions for Part 15 transmitters operating in the television broadcast bands until the Advanced Television Systems (MM Docket No. 87-268) proceeding is resolved.

BACKGROUND

2. Radio Telecom and Technology, Inc. has developed a two-way wireless radio system to transmit digital signals between "one or more central hubs" and "tens of thousands" of remote locations.[2] The system would be used to provide interactive television services, such as advertiser response, viewer polling, home shopping, educational television, and other functions relating to the television programming. According to RTT, the system would also be used for computer links or cordless telephone operation. The system is designed to operate on a vacant, first-adjacent channel to an operating UHF TV broadcast station. Transmissions are made only during the horizontal and vertical blanking intervals of the television station.

3. On June 6, 1990, RTT filed a petition for waiver of Section 15.247 of the Commission's Rules to permit the authorization of its system.[3] Specifically, RTT requested permission to operate its system in the UHF television bands on a nonlicensed basis under Part 15 of our rules. RTT also requested that its system be considered a spread spectrum system, as described in Section 15.247.

4. On August 27, 1991, the Chief Engineer denied RTT's petition for waiver. The Chief Engineer stated that, in Docket 87-389, the Commission had declined to consider any additional provisions for Part 15 transmitters operating in the television bands until the Advanced Television Systems (ATV) proceeding is resolved. The Chief Engineer indicated that RTT had not provided any new information or sufficient justification to warrant review of this decision. While RTT had stated that its system would not interfere with ATV, the Chief Engineer responded that a fair assessment of the potential for interference can not be made until an ATV standard is selected. The Chief Engineer indicated that ATV systems will use many, if not all, of the vacant UHF TV channels, including channels that are adjacent to NTSC stations, and that ATV signals may not have blanking intervals during which transmissions could be made without causing harmful interference. Thus, the Chief Engineer concluded that it would be inappropriate to allow such systems to operate in the UHF TV bands at this time.

5. On September 26, 1991, RTT filed a *Petition for Review* requesting that the Commission reverse the Chief Engineer's denial and grant RTT's waiver request. RTT argues that the denial (1) was contrary to Commission's policy to encourage new technology, (2) was not necessary to protect ATV development,[4] and (3) did not deal with an alternative frequency band that RTT proposed in its reply comments on the waiver petition.

6. The Association of Maximum Service Television, Inc. (MSTV) filed comments in opposition to RTT's petition. MSTV states that the Commission has on several occasions indicated a clear commitment to keep the UHF band "clean" for ATV. MSTV believes that ATV will leave few, if any, UHF channels vacant in the country's largest markets and that ATV systems, which are almost certain not to have the blanking intervals critical to the operation of RTT's system, will occupy spectrum adjacent to both NTSC and other ATV channels. MSTV concludes that it is far too risky at this point to consider allocation of the UHF band to other services, even on a secondary basis. MSTV further suggests that if RTT is successful in loading as many as 300,000 customers on a single channel, the Commission would have difficulty in uprooting so many customers or rendering obsolete so much customer equipment upon the advent of ATV.

DISCUSSION

7. We find that the action taken by the Chief Engineer in denying RTT's petition for waiver was appropriate. We disagree with RTT's assertions that the Chief Engineer's action was inconsistent with Commission's policy to encourage new technology. The Commission is aware of the public interest benefits that could be provided by the type of services proposed by RTT and recently has adopted rules

[1] While the Chief Engineer characterized his action as dismissal, given that he addressed the merits of the waiver, it is more appropriately characterized as a denial, and will be so referred to herein.

[2] T-NET Interactive Television (T-NET), a trade name by RTT.

[3] *See* 47 CFR Section 15.247 which deals with non-licensed direct sequence and frequency hopping spread spectrum transmission systems.

[4] RTT believes that T-NET will not limit the deployment of ATV. RTT suggests that it is unlikely that every UHF television channel will be occupied in any one geographic area; and, after ATV is implemented, there will be room for T-Net. RTT points out that Part 15 operations are already secondary and, as such, would have to yield to ATV transmissions should interference result.

to provide for Interactive Video and Data Services (IVDS), such as those proposed by RTT, in other frequency bands on a licensed basis.[5] Therefore, we find no merit in RTT's assertion that the Chief Engineer's action was contrary to the Commission's policy to encourage new technology.

8. We also disagree with RTT's claim that the Chief Engineer's action was not necessary to protect ATV development. The Commission has already taken several steps to protect the television bands for future ATV service. For example, further considerations of proposals for land mobile licensees to share spectrum in the UHF band have been postponed.[6] Also, in the proceeding revising the Part 15 regulations the Commission declined to consider any additional provisions for Part 15 transmitters operating in the television bands.[7] Indeed, the Commission declined to permit Part 15 transmitters employing power levels several orders of magnitude less than those desired by RTT to operate in the television bands. In addition to the instant request for waiver, RTT has filed comments regarding this request in four separate docketed proceedings; and, the Commission has denied RTT in each case, primarily due to unresolved ATV considerations. Therefore, the Chief Engineer's action was consistent with Commission's policy to protect future ATV operations.

9. Finally, RTT claims that the Chief Engineer ignored an acceptable alternative proposal to allow operation of its system in the 216-220 MHz band. In reply comments filed in response to its original petition for waiver, RTT indicated that its system could also operate in the 216-220 MHz band, and that it "would have no objection" to a rule waiver allowing it to do so. RTT is correct that this matter was not addressed in the Chief Engineer's denial of its petition. We note, however, that based on RTT's comments filed in GEN Docket No. 91-2, the substance of RTT's request was considered fully, as were all other comments filed in that proceeding, before establishing the rules for IVDS. Furthermore, with regard to the merits of RTT's alternative proposal, we find that RTT has not provided sufficient information concerning the potential for interference to licensed services on these frequencies. Moreover, we find that the current Part 15 technical standards for spread spectrum systems would be inappropriate for operation in the 216-220 MHz band. For example, the services using the existing Part 15 spread spectrum bands are much less susceptible to interference than services in the 216-220 MHz band.[8] Also, the current Part 15 spread spectrum bands are much higher in frequency where propagation losses are greater and, therefore, the interference potential is less. Finally, RTT's system does not comply with the basic technical requirements for Part 15 spread spectrum systems. These requirements were established to avoid significant interference problems. Accordingly, we conclude that RTT's system should not be granted a waiver to operate in the 216-220 MHz band under the Part 15 spread spectrum rules.

10. For the above reasons, we are reaffirming the action taken by the Chief Engineer denying RTT's waiver request. We find RTT has not produced any information that would warrant reversing or modifying the Chief Engineer's previous decision.

ORDERING CLAUSES

11. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 301, 302, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), 301, 302 and 303, IT IS ORDERED that the Petition for Review filed by Radio Telecom and Technology, Inc. IS DENIED. This *Order* is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[5] *See Report and Order* in GEN Docket No. 91-2, 7 FCC Rcd 1630 (1992). RTT's system may be operated, under these rules, on a licensed basis in the 218-219 MHz IVDS band, so long as it complies with the Part 95 IVDS requirements. RTT and others have filed petitions seeking reconsideration of certain requirements adopted in the *Report and Order* in GEN Docket No. 91-2. Those petitions have been addressed separately. *See Memorandum, Opinion and Order*, GEN Docket No. 91-2, FCC 92-331, released August 4, 1992.

[6] *See Order*, GEN Docket No. 85-172, 2 FCC Rcd 6441 (1987), para. 8.

[7] *See* GEN Docket No. 87-389, adopted March 30, 1989, 4 FCC Rcd 3493 (1989).

[8] Part 15 spread spectrum systems currently operate only in certain frequency bands allocated for Industrial, Scientific, and Medical equipment. Other services that share these bands are generally tolerant of radio noise generated by this equipment and are, therefore, less vulnerable to interference from Part 15 spread spectrum systems. The 216-220 MHz band is allocated for maritime and land mobile use, and interference to these services from Part 15 spread spectrum operations is more likely.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal Nos. 185 and 204

Tariff F.C.C. No. 1

Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1993; Released: April 19, 1993

By the Commission:

I. INTRODUCTION

1. On July 24, 1987, the Common Carrier Bureau released an Order denying petitions against Bell Atlantic Telephone Companies' (Bell Atlantic) Transmittal Nos. 185 and 204.[1] These transmittals, which were designed to remedy an earnings shortfall, increased special access monthly rates in areas served by the Chesapeake and Potomac Telephone Companies. *The July 1987 Order* permitted the revisions set out in the transmittal to become effective on July 25, 1987. The Bureau said, "We conclude that Bell Atlantic's proposal is not patently unlawful and thus does not warrant rejection. Nor is there a sufficient likelihood that the proposed revisions would be found unlawful to warrant investigation."[2]

2. On August 24, 1987, Ad Hoc filed an application for review of the *July 1987 Order* arguing that the Commission did not adequately explain its decision to deny the petitions against Transmittals 185 and 204. Various parties responded to the application.[3] For the reasons discussed below, we deny Ad Hoc's application for review.

3. In its application for review, Ad Hoc seeks Commission investigation of the special access rates of Bell Atlantic's Chesapeake and Potomac Telephone Companies (C&P) and requests revision of the Commission's access tariff mid-course correction policy to compel exchange carriers such as Bell Atlantic to better document the need for such corrections. Ad Hoc Application at 22-24. Accord Western Union Comments at 1; Networks' Reply at 4-6. In particular, Ad Hoc claims in its application that Bell Atlantic did not adequately demonstrate that its cost support materials, including projected cost and demand estimates, were sufficient to justify its proposed rate levels. Ad Hoc Application at 7-15. Bell Atlantic denies that the allegations raised are sufficient to justify rejection or suspension and investigation of the filing. Bell Atlantic Opposition at 2-6.

4. Ad Hoc and Western Union also argue that, on its face, the *July 1987 Order* shows no evidence of a detailed decision by the Commission to reject the petitions filed against the transmittals. They contend that the Bureau should have defined what is "patently unlawful" and what represents a "sufficient likelihood" that a tariff transmittal would be found unlawful. They assert that the order contained boilerplate language which offered no guidance to future petitioners and insist the Bureau make its review methodology more explicit. Ad Hoc Application at 7; Western Union Comments at 2. Western Union argues that the Bureau's failure to provide the basis of its decision induces petitioners to make arguments that the Bureau may have secretly rejected in the past or causes them to ignore arguments that may be acceptable. Western Union Comments at 5.

5. In its opposition, Bell Atlantic agrees that the Communications Act requires the Commission to explain its decision to reject or suspend a tariff. However, it argues that the Act does not require the Commission to "author long essays in order to approve routine tariff filings." Bell Atlantic Opposition at 3.[4] Bell Atlantic also asserts that an extended discussion of the Commission's rationale would be inconsequential because an order "approving" or allowing a tariff to become effective cannot be appealed. *Id.*[5]

6. Ad Hoc argues in its reply to Bell Atlantic's opposition that the Commission need not "author long essays," but must demonstrate that it scrutinizes tariff filings to assure that rates are just and reasonable. Ad Hoc Reply at 4. The Networks argue that the Bureau failed to provide a substantive explanation for rejecting the petitions against the transmittals, leaving users with no guidance regarding the Bureau's standards for rejection or suspension and/or investigation of a tariff filing. Networks' Reply at 3.

II. DISCUSSION

7. Ad Hoc's objections to the content of the *July 1987 Order* and to the Common Carrier Bureau's general policy

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[1] Bell Atlantic Telephone Companies, Transmittal Nos. 185 and 204, 2 FCC Rcd 5652 (Com. Car. Bur. 1987) (*July 1987 Order*). American Telephone and Telegraph Company (AT&T), ITT Communications Service, Inc., Capital Cities/ABC, Inc., CBS, Inc., and National Broadcasting Company, Inc. filed petitions to suspend and investigate Transmittal 185. The Ad Hoc Telecommunications Users Committee (Ad Hoc), MCI Telecommunications Corporation, and Western Union Telegraph Company (Western Union) filed petitions to reject or suspend and investigate Transmittal 185.

[2] *July 1987 Order*, 2 FCC Rcd at 5652.

[3] On September 2, 1987, Western Union filed comments on the application. On September 22, 1987, Bell Atlantic filed an opposition to the application. On October 16, 1987, Ad Hoc and Capital Cities/ABC, Inc., CBS, Inc., and NBC, Inc. (Networks), filed replies to Bell Atlantic's opposition.

[4] *Citing* Section 204(a) of the Communications Act, 47 U.S.C. § 204(a).

[5] *Citing* Papago Tribal Utility Authority v. FERC, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980); Western Union International v. FCC, 652 F.2d 136 (D.C. Cir. 1980).

regarding denial of petitions against tariff filings[6] are unfounded. The denial of a petition to reject a tariff merely concludes that a challenged provision is not patently unlawful.[7] It does not preclude the Commission from initiating a subsequent investigation or a party from initiating a Section 208 complaint proceeding to determine whether a tariff is in fact lawful.[8] The denial of a petition to suspend and investigate a tariff filing similarly does not prevent this Commission from starting an investigation at a later date, nor does it prohibit aggrieved parties from filing a Section 208 complaint. Under these circumstances, a detailed statement of reasons for the action taken is not required.

8. Furthermore, it is a basic tenet of administrative law that an agency should be free to develop its own administrative procedures within the limits of governing statutes.[9] Section 154(j) of the Communications Act, 47 U.S.C. § 154(j), empowers the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." The Commission thus has substantial discretion to formulate procedures for the consideration of petitions, as long as the agency operates within Section 555(e) of the Administrative Procedure Act, 5 U.S.C. § 555(e), which requires that a denial be accompanied by a brief statement of the grounds therefor and be consistent with the statutory provisions governing tariff filings and review. In the case of review of tariff filings which, by statute, must be done quickly, *see* 47 U.S.C. §§ 203(b)(1), 204(a)(1), we believe the Commission has heightened discretion not to provide a detailed exposition of its reasoning not to reject or suspend and/or investigate.[10]

9. In the Bell Atlantic order, the Bureau stated that it had reviewed the transmittals and the pleadings filed by petitioners and concluded that the tariff was not patently unlawful and did not warrant either rejection or suspension and/or investigation. We find that the Bureau complied with the Administrative Procedure Act because these statements in the order demonstrate that the Bureau had considered the arguments against the tariff, and then explained why the tariff was allowed to become effective in terms of the Title II tariff review provisions.[11] Finally, we have reviewed the substantive arguments which Ad Hoc raises in its application for review and affirm the Bureau's action denying Ad Hoc's petition.

III. CONCLUSION AND ORDERING CLAUSE

10. We conclude that the Bureau adequately explained its denial of petitions to reject, or to suspend and/or investigate Bell Atlantic Transmittal Nos. 185 and 204. Therefore, Ad Hoc's application for review of the Bureau's *July 1987 Order* on Bell Atlantic Transmittals 185 and 204 is denied.

11. ACCORDINGLY, IT IS ORDERED that the application for review of the Bureau's *July 1987 Order* filed by the Ad Hoc Telecommunications Users Committee IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[6] *See* New Policy Regarding Issuance of Tariff Orders, Public Notice, Mimeo No. 3805, released Apr. 15, 1986 (stating that the Bureau will no longer issue orders addressing substantive or procedural issues raised by petitioners regarding tariff filings that are being allowed to take effect without imposition of an investigation or accounting or reporting requirements).

[7] The D.C. Circuit has employed the patently unlawful standard to justify the summary rejection of carrier-initiated tariffs. *See* Municipal Light Boards v. FPC, 450 F.2d 1341, 1345-46 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

[8] Under Section 208, a party may obtain appropriate equitable relief or recover damages if it can establish that a carrier-initiated tariff violates the Communications Act or a rule or order of this Commission.

[9] Vermont Yankee Nuclear Power v. Natural Resources Defense Council, 435 U.S. 519, 543-44 (1978); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

[10] *Cf. American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (giving recognition to "the relatively short time frame within which Congress directed the agency to [act]" and the "speed with which the FCC was compelled to act").

[11] *Cf. Dunlop v. Bachowski*, 421 U.S. 560, 563, 573 (1975) (dicta) (a letter denying a request "[b]ased on the investigative findings may have sufficed" for purposes of Section 553(e)).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Declaratory Ruling by Richard Wilmshurst with Regard to Inside Wiring Abandoned on Private Property by Pacific Bell — AAD 92-37

ORDER

Adopted: April 1, 1993; Released: April 19, 1993

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 9, 1992, Richard E. Wilmshurst ("Wilmshurst") requested the Commission to issue a declaratory ruling that any dispute over the ownership of abandoned inside wiring should be decided by state courts applying state property law. The Common Carrier Bureau has delegated authority over this petition pursuant to Commission rules 0.91 and 0.291.[1] On December 22, 1992, Pacific Bell filed a Motion to Dismiss the Wilmshurst petition as moot. For the reasons set forth below, we grant Pacific Bell's motion and dismiss the Wilmshurst petition.

II. BACKGROUND

2. The petitioner is the majority stockholder in the company Miners & Prospectors, Inc., which owns the Utica House Hotel Complex ("hotel") located in Angels Camp, California. Petitioner alleges that Pacific Bell abandoned dangerous inside wiring on this private property. Wilmshurst requests the Commission to issue a declaratory ruling interpreting paragraph 50 of the Commission's Second Order and Report of *Detariffing the Installation and Maintenance of Inside Wiring*[2] to provide that any dispute over the ownership of inside wiring shall be resolved by state courts, not state public utility commissions, applying state property law. According to the petitioner, the property law of the state of California would require Pacific Bell, the alleged owner of the inside wiring located on the petitioner's premises, to remove its property without charge. The petitioner requests that the Commission should rule that state property law, as opposed to state public utility law, should be controlling.

3. The petition reveals that there have been two state court actions filed concerning the disputes raised in this proceeding. First, on July 15, 1991, Pacific Bell filed an action at the Small Claims Division of the Calaveras County Justice Court in California seeking the value of its pay telephone on Wilmshurst's hotel property, which the petitioner would not allow to be removed. Second, on October 28, 1991, Wilmshurst filed an action on behalf of himself and the Miners and Prospectors Co., in the California Superior Court in Calaveras County, seeking to require Pacific Bell to remove the abandoned inside wiring at issue in this proceeding from the Utica Hotel at no charge.

III. DISCUSSION

4. By public notice issued on May 6, 1992, we invited comments on Wilmshurst's petition. The majority of parties commenting argue that we should defer to the California state courts on the issues raised in Wilmshurst's petition.[3]

5. On December 22, 1992, Pacific Bell submitted a Motion to Dismiss the Wilmshurst petition as moot because Wilmshurst and Pacific Bell entered into a settlement agreement on October 22, 1992, that resolved the disputes between the parties concerning the ownership of the inside wiring on Wilmshurst's property.

6. The settlement agreement specifically provides that Pacific Bell would be allowed to recover its pay telephone from the hotel property and in exchange, it would drop its Small Claims action. The agreement also provides that Wilmshurst will be given ownership over the inside wiring at issue in this proceeding and will be paid by Pacific Bell $1,750 in consideration for dropping any claims, and not pursuing any future claims, against Pacific Bell for removal of, or damage caused by the same inside wiring. On December 11, 1992, Pacific Bell retrieved its pay telephone from the hotel and Wilmshurst was paid the sum agreed upon in the settlement agreement by Pacific Bell. On that same day, a request for dismissal was filed in each of the two pending court actions.

7. On January 5, 1993, Wilmshurst filed an Opposition to Pacific Bell's Motion to Dismiss. Mr. Wilmshurst, while admitting that the underlying dispute in this proceeding has been settled, argues that it is in the public interest that we should decide his petition on the merits.

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[1] 47 C.F.R. §§0.91 and 0.291.

[2] Paragraph 50 reads:

> Although we are requiring the telephone companies to abandon any claim of ownership of wiring that has been expensed or fully amortized, we have not concluded that this Commission should not attempt to determine ownership of the abandoned wiring. Conflicting claims may arise if the subscriber is not the owner of the premises. Such questions are best resolved through the application of local property law. No federal interest would be furthered by attempting to establish a national standard that must be applied in all instances.

Detariffing the Installation and Maintenance of Inside Wiring, *Second Report and Order*, 59 Rad. Reg. 1143, 1157, para. 50 (1986).

[3] The parties submitting comments are Pacific Bell, the People of the State of California and the Public Utilities Commission of the State of California, the United States Telephone Association and the Utilities Telecommunications Council. Reply comments were submitted by Richard Wilmshurst and Southwestern Bell Telephone Company.

8. After reviewing the record in this proceeding, including the comments filed, we are satisfied that granting Pacific Bell's Motion to Dismiss would serve the public interest.[4] The disputes between Mr. Wilmshurst and Pacific Bell have been resolved, and no federal purpose would be served by granting the ruling requested by Wilmshurst. Furthermore, principles of comity and federalism counsel against our reaching out to determine the proper state forum for resolution of a dispute that no longer exists.

IV. CONCLUSION

9. For the reasons discussed above, we grant Pacific Bell's Motion to Dismiss the Wilmshurst petition as moot. The Wilmshurst Petition for Declaratory Ruling is hereby dismissed.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 154(j), and 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Motion to Dismiss of Pacific Bell is GRANTED, to the extent indicated above.

11. IT IS FURTHERED ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 154(j), and 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petition for Declaratory Ruling of Richard E. Wilmshurst is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

[4] We note that Mr. Wilmshurst has filed the following pleadings in this proceeding: Petition for a Declaratory Judgment; Consolidated Reply to Comment of California Public Utilities Commission, Pacific Bell and the Utilities Telecommunications Council; Opposition to Motion to Dismiss by Pacific Bell; and Consolidated Reply to Comments of United States Telephone Association and Southwestern Bell Telephone Company. We accepted Mr. Wilmshurst's Consolidated Reply to Comments of United States Telephone Association and Southwestern Bell Telephone Company, although it was filed late, in the interests of justice and fairness, because the United States Telephone Association and Southwestern Bell Telephone Company failed to serve their comments upon the petitioner and he did not become aware of their comments in time to make a timely response.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Edison Cellular — MSD-92-27
Station KNKN 281

For the Block A Cellular System
In the Minnesota 4 - Lake RSA
(Market # 485A)

Public Notice Establishing — MSD-93-12
Dates and Filing Requirements
for Applications for Cellular
Radio Unserved Areas
Report No. CL-93-36

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: April 1, 1993; Released: April 19, 1993

By the Chief, Common Carrier Bureau:

1. Applicants Against Lottery Abuses (AALA) have filed petitions for reconsideration of two Public Notices issued by the Mobile Services Division (Division). Responsive pleadings were filed. For the reasons discussed below, we deny the first petition and dismiss the second petition for reconsideration.

BACKGROUND

2. Edison Cellular (Edison) was the licensee of Station KNKN281 for the block A cellular system in the Minnesota 4 - Lake, Rural Service Area (RSA), (Market No. 485A).[1] Edison voluntarily relinquished its authorization.[2] The Division notified the public that Edison's authorization was cancelled effective March 25, 1992. *See* Public Notice, Report No. CL-92-69 (Mar. 30, 1992). The Public Notice specified that the Minnesota 4 - Lake RSA would be treated as an unserved area for filing purposes. As a result, new applications would not be accepted for this RSA until the Commission announced the filing date for unserved area applications. The Division subsequently announced the filing date for certain unserved areas, including the Minnesota 4 - Lake RSA. *See* Public Notice, Report No. CL-93-36 (Dec. 23, 1992).

PLEADINGS

3. AALA argues that opening up the market for acceptance of new applications is inappropriate, inequitable, and in contravention of well established principles. According to AALA, the original applicants[3] had their applications dismissed solely because of Edison's fraud upon the Commission and competing applicants. To subject the original applicants to a second round of competition, AALA maintains, would needlessly delay the institution of cellular service, and would "smack of an unwarranted sanction against [the applicant]."[4] *Son Broadcasting, Inc.*, 52 RR 2d 1017, 1018 (1982). The fair remedy, according to AALA, is to reinstate the original dismissed applications, and hold a re-lottery among the original applicants.[5] AALA asserts that this recommended approach would save Commission resources, since it would not have to accept and process all new applications. In its second petition, AALA contends that it was gross error to include RSA No. 485 in the second Public Notice while its petition for reconsideration of the first Public Notice was still pending and unresolved.

4. Cellular Pacific, Crystal Communications Systems, Data Cellular Systems, North American Cellular, and Satellite Cellular Systems (hereinafter Cellular Pacific) opposed the first petition for reconsideration. Cellular Pacific argues that AALA lacks standing in this proceeding because it cannot demonstrate how its interests are adversely affected by the Commission's actions. According to Cellular Pacific, there are no adverse findings against Edison. In addition, Cellular Pacific argues that the Commission chose not to set aside Edison's grant, issuing an Order to

[1] Edison received its construction permit for Market No. 485A on September 11, 1989. By letter dated November 13, 1989, after its application was granted and the dismissal of the other applications for market No. 485A had became final, Edison notified the Commission that it had entered into a mutual contingent risk sharing agreement, in September 1988.

[2] Edison was ordered to show cause why its license should not be revoked for its participation in the mutual contingent risk sharing agreements. *See Algreg Cellular Engineering (Hearing Designation Order)*, 6 FCC Rcd 2921 (Com. Car. Bur. 1991). Subsequently, issues were added against Edison, to determine whether it had violated Section 22.43(c)(2) of the Commission's Rules (completion of construction and provision of service to the public). A notice of apparent liability for a $200,000 forfeiture was also issued. Edison surrendered its authorization prior to the issuance of a decision in the hearing, and as a result no findings were made against Edison. The Presiding Judge dismissed the Order to Show Cause against Edison and terminated Edison's participation in the proceeding. *Algreg Cellular Engineering*, FCC 92M-384 (March 26, 1992).

[3] AALA is a group composed of applicants in RSA No. 485A and other markets. Once authorizations were granted in these markets, their applications were dismissed.

[4] AALA maintains that the Commission and some of the original applicants have expended extensive resources in a long and complex hearing to protect the Commission's processes, because of Edison's wrongdoing. However, the original applicants will now be forced to expend additional time and money to repeat the application process, and will be forced to compete with a growing number of applicants, AALA maintains.

[5] When a judgment or Order becomes final, a court or administrative agency, as a matter of equity, may set aside its action, on its own motion, in cases where abuse of process, fraud, or misrepresentations are disclosed, AALA asserts, citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) (under equity, and in particular circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry, to correct particular injustices involved in these situations).

Show Cause instead. As a result, Edison's grant would have to be set aside before the previously dismissed applications could be reinstated, Cellular Pacific alleges.[6]

5. The fact that AALA members would have to refile is a minor inconvenience, according to Cellular Pacific. Furthermore, Cellular Pacific maintains that the random selection procedures were not designed to reward AALA for its litigation efforts. In addition, a relottery would not expedite service to the public, according to Cellular Pacific. Finally, Cellular Pacific contends that treatment of Market No. 485A as an unserved area is consistent with Commission practice for other markets where authorizations have been voluntarily submitted for cancellation.

6. Alpha Cellular (Alpha), in opposing both petitions, argues that AALA is in effect seeking reconsideration of the action dismissing all the competing applications for Market No. 485A. Public notice of this action was given September 11, 1989, according to Alpha. Therefore, the petition is untimely, Alpha maintains. Under the Communications Act, Alpha asserts, the revocation proceeding against Edison was correct and, therefore, there is no need for the Commission to create an extra-statutory procedure (such as setting aside judgments *vis-a-vis* administrative finality).

DISCUSSION

7. We agree with Cellular Pacific that AALA has failed to establish its standing in this case. The party seeking reconsideration must show with particularity the manner in which the person's interest is adversely affected by the action. AALA has failed to establish how it is "adversely affected" by the action.[7] Adversely affected has been analogized to a direct economic injury. *See Sierra Club v. Morton*, 405 U.S. 739 (1971). AALA's participation in the *Algreg* proceeding is not sufficient to support direct injury. The adverse impact of a Commission action on AALA's litigation strategy in the *Algreg* proceeding would not meet this test. In addition, AALA has not demonstrated that treating Market No. 485A as an unserved area will cause it direct economic injury, since it can file again (delays and increased competition do not meet the criteria of direct economic injury). *See also Duke Power Co. v. Carolina Environmental Study Group Inc.*, 438 U.S. 59, 72, 78 (1978); *Martin-Trigona v. FCC*, 432 F. 2d 682 (D.C. Cir. 1970); *Brian L. O Neill*, 6 FCC Rcd 2572, 2574 (1991); *National Broadcasting Co.*, 37 FCC 2d 897, 898 (1972). Nonetheless, we take this opportunity to reiterate the Commission's authority to accept new applications for this market.

8. The Commission's policies clearly allow the dismissal of mutually exclusive applications following the grant of an authorization. "Only one licensee per frequency block will be authorized . . .. After the construction permits are issued for each frequency block, all other applications for the RSA will be dismissed." *Rules for Rural Cellular Radio Service*, 2 FCC Rcd 4008 (1987)(Erratum). Parties had ample notice and opportunity to comment on this procedure during the rulemaking proceeding. The Commission has stated also that "once the authorization is issued the unsuccessful lottery participant's applications are properly dismissed. Any failure by the authorized carrier to construct or otherwise comply with the rules may cause revocation or forfeiture of the authorization, which would lead to a new lottery, with newly filed applications." *See Vivian E. Warner*, 6 FCC Rcd 6033 (1991). Edison's application was granted and the other applications were then dismissed. When Edison subsequently tendered its license for cancellation, our policies provide that new applications may be filed and a new lottery held, as needed.[8]

9. Although we are aware of the argument presented by the petitioners, that previous judgments may be set aside if they were procured by fraud, in Edison's case there is no judgement of fraud or abuse of process. Since Edison turned in its license, no findings were made concerning its participation in the mutual contingent risk sharing agreements (see note 2, *supra*). Thus, there is no basis for setting aside the grant of Edison's license, as suggested by AALA.[9]

CONCLUSION

10. For the foregoing reasons we find that the Mobile Services Division was correct in determining that Market No. 485A would be treated as an unserved area for filing purposes and that new applications would be accepted for this market.

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[6] According to Cellular Pacific, the Public Notice is not an action subject to reconsideration.

[7] Section 1.106(b)(1) of the Commission's Rules provides that "any ... person whose interests are adversely affected by any action taken by the Commission ... may file a petition for reconsideration." We agree with Alpha that to the extent that the first petition is an untimely petition for reconsideration of the action dismissing all competing applications, it should be dismissed. *See* Section 1.106(f) of the Rules. The second public notice, which established dates for filing applications for unserved areas, is not an action from which a petition for reconsideration would lie since it is really an interlocutory action. Therefore, the petition against this public notice is dismissed. *See* Section 1.106(a) (petitions for reconsideration of interlocutory actions will not be entertained).

[8] Delays, if any, in the institution of cellular service and any minor inconvenience of filing again, are outweighed by the need for administrative finality. *Greater Boston Television Corp. v. FCC*, 463 F. 2d 268, 286 (D.C. Cir. 1971).

[9] We find the cases cited by AALA are inapposit to the facts here. *TV-8, Inc.*, 2 FCC Rcd 1218 (1987) (denied petition to set aside grant because there was no fraud in the invocation of Commission processes); *Meredith Corp.* 39 R.R. 2d 690, 692 n.5 (1977) (*in dicta* stated that the Commission may set aside its action in cases where abuse of process, fraud, or misrepresentations are disclosed and refused to reconsider grant); *United Broadcasting Co. of Florida, Inc.*, 61 FCC 2d 970 (1976) (Commission refused to set aside the denial of renewal of license because there was no evidence of matters that would adversely reflect on integrity of Commission processes); *Overmyer Broadcasting, Co. Inc.*; 27 FCC 2d 982 (1971) (the Commission sent to hearing to investigate whether misrepresentations were made in transfer of control applications which had been granted three years earlier, limited to reform an executory option involving Overmyer's remaining 20 percent stock interest in permittee); *City of Jacksonville*, 35 FCC 401 (1963) (Commission did not address issue that it could set aside grants because of abuse of process, since they were not dispositive; Florida-Georgia Television retained its grant *vis-a-vis* allegations there were *ex-parte* contacts made in the comparative proceeding to grant the licenses); *Cumberland Gap Broadcasting*, 13 FCC 6 (1948) (the Commission revoked permit because witness admitted misrepresenting facts in comparative hearing; reinstated and granted Cumberland Gap's application holding that an applicant, deprived of a grant by fraud practiced upon the Commission, deserved that its application be given further consideration).

ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, that the first petition for reconsideration filed by Applicants Against Lottery Abuses IS DENIED and the second petition for reconsideration IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-100

In the Matter of

Amendment of Section 73.202(b), RM-8175
Table of Allotments,
FM Broadcast Stations.
(Cleveland and Ebenezer,
Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 29, 1993; Released: April 20, 1993

Comment Date: June 11, 1993
Reply Comment Date: June 28, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed jointly by Radio Cleveland, Inc. ("Radio Cleveland") and James L. Haffey d/b/a JimBar Enterprises ("JimBar"), requesting the substitution of Channel 280C3 for Channel 280A at Cleveland, Mississippi, and deletion of Channel 280A at Ebenezer, Mississippi. Radio Cleveland and JimBar submitted information in support of the proposal. Radio Cleveland expressed its intention to apply for Channel 280C3 at Cleveland.

2. We believe the public interest would be served by consideration of the proposal. Radio Cleveland, licensee of Station WCLD-FM, Cleveland, Mississippi, requests the substitution of Channel 280C2 for Channel 280A and modification of its license to specify operation on the higher class channel. A Commission engineering analysis indicates that Channel 280C3 can be allotted to Cleveland in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 280A at Ebenezer is deleted.[1] JimBar, permittee of Station WZBR-FM, Channel 280A, has requested that its construction permit for Ebenezer be cancelled and the channel deleted.[2] In support of its request for cancellation of the construction permit, JimBar has determined that Ebenezer, an unincorporated community with a 1984 estimated population of 150, cannot feasibly support a new FM station in light of the current economic conditions.[3] We shall propose to modify the license for Station WCLD-FM, Channel 280A, to specify operation on Channel 280C3 in accordance with section 1.420(g) of the Commission's Rules.

3. We shall also seek comments as to whether we should delete Channel 280A at Ebenezer to accommodate the upgrade at Cleveland. Channel 280A was allotted to Ebenezer in MM Docket 89-324. *See* 5 FCC Rcd 682 (1990). Since the Commission has cancelled JimBar's construction permit, the channel is considered vacant. If, however, comments are filed during the comment cycle in this proceeding stating an intention to file an application for the channel, upon termination of this proceeding a filing window will be opened for Channel 280A at Ebenezer.[4] If no interest is expressed in retaining the channel, we shall delete the channel at Ebenezer. It is Commission policy not to delete a channel in which interest has been expressed. Should it later appear, however, that there is undue delay in activating the channel in Ebenezer, we would consider a further petition to remove the channel at Ebenezer, Mississippi, to accommodate expanded service at Cleveland. *See Billings & Lewistown, Montana*, 6 FCC Rcd 3632 (1991).

4. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following communities:

OPTION I

	Channel No.	
City	Present	Proposed
Cleveland, Mississippi	224A, 252C3, 280A[5]	224A, 252C3, 280C3
Ebenezer, Mississippi	280A	---

OPTION II

Cleveland, Mississippi	224A, 252C3, 280A	224A, 252C3, 280A
Ebenezer, Mississippi	280A	280A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

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[1] The coordinates for Channel 280C3 at Cleveland are 33-43-59 and 90-41-38.

[2] On January 7, 1993, JimBar Enterprises filed a letter with the Commission requesting cancellation of the construction permit for Station WZBR-FM, Ebenezer, Mississippi (File Nos. BPH-900424ME, BMPH-920116IO). The Commission granted JimBar's request on March 23, 1993.

[3] The *1992 Rand McNally Commercial Atlas* indicates Ebenezer has its own post office and zip code and credits it with a population of 100.

[4] A Commission engineering analysis indicates Channel 280A is the only channel available for allotment at Ebenezer.

[5] Larry G. Fuss has proposed the substitution of Channel 225C2 for Channel 224A in MM Docket 92-157. *See* 7 FCC Rcd 4840 (1992).

6. Interested parties may file comments on or before **June 11, 1993,** and reply comments on or before **June 28, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Frank R. Jazzo
Fletcher, Heald & Hildreth
1300 N. 17th Street, 11th Floor
Rosslyn, Virginia 22079

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-98

In the Matter of

Amendment of Section 73.202(b), RM-8207
Table of Allotments,
FM Broadcast Stations.
(Rushford, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 26, 1993; Released: April 20, 1993

Comment Date: June 11, 1993
Reply Comment Date: June 28, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Wheeler Broadcasting Of Minnesota, Inc. ("petitioner"), requesting the substitution of Channel 257C3 for Channel 257A at Rushford, Minnesota. Petitioner also requests modification of its license for Station KWNO-FM, Channel 257A, to specify operation on Channel 257C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.[1]

2. We believe petitioner's proposal warrants consideration. Channel 257C3 can be allotted to Rushford, Minnesota, consistent with the Commission's spacing requirements at petitioner's specified site.[2] We shall also propose to modify the license for Station KWNO-FM, Channel 257A, to specify operation on Channel 257C3 in accordance with section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 257C3 for Channel 257A at Rushford, Minnesota, since it could provide the community with expanded local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Rushford, Minnesota	257A	257C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 11, 1993,** and reply comments on or before **June 28, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

Ray L. Wheeler, Chairman
Wheeler Broadcasting of Minnesota, Inc.
216 Center Street
Winona, Minnesota 55987

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 257C3 at Rushford are 43-50-51 and 91-42-11.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-97

In the Matter of

Amendment of Section 73.202(b), RM-8203
Table of Allotments,
FM Broadcast Stations.
(Norway, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 26, 1993; Released: April 20, 1993

Comment Date: June 11, 1993
Reply Comment Date: June 28, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Zephyr Broadcasting Inc. ("petitioner"), requesting the substitution of Channel 232C3 for Channel 232A at Norway, Michigan. Petitioner also requested modification of its license for Station WZNL(FM), Channel 232A, to specify operation on Channel 232C3. Petitioner submitted an engineering analysis in support of the proposal and stated its intention to file an application for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 232C3 for Channel 232A at Norway, Michigan, since it would provide the community with expanded service. Channel 232C3 can be allotted to Norway, Michigan, at petitioner's specified site in compliance with the Commission's spacing requirements.[1] Channel 232C3 is short spaced to Station WRJO, Channel 232A, Eagle River, Wisconsin. However, Channel 233C2 was substituted for Channel 232A in MM Docket 88-313. *See* 4 FCC Rcd 3793 (1989). Station WRJO has a construction permit for Channel 233C2 at a site that is fully spaced to Channel 232C3 at Norway. The grant of a license for Channel 232C3 at Norway may be withheld pending issuance of a license for Station WRJO, Eagle River, on Channel 233C2. Since Norway is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be obtained for this allotment. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Norway or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested party.

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Norway, Michigan	232A	232C3

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Nicolet Broadcasting, Inc.
Station WRJO
Box 309
Eagle River, Wisconsin 54521

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 11, 1993,** and reply comments on or before **June 28, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Brian M. Madden
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. How-

[1] The coordinates for Channel 232C3 at Norway are 45-46-29 and 87-55-22.

ever, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-99

In the Matter of

Amendment of Section 73.202(b), RM-8202
Table of Allotments,
FM Broadcast Stations.
(Moberly, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 26, 1993; Released: April 20, 1993

Comment Date: June 11, 1993
Reply Comment Date: June 28, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by FM 105, Inc. ("petitioner"), requesting the substitution of Channel 288C2 for Channel 288C3 at Moberly, Missouri. Petitioner also requested modification of its construction permit for Station KZZT(FM), Channel 288C3, to specify operation on Channel 288C2.[1] Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 288C2 can be allotted to Moberly, Missouri, consistent with the Commission's spacing requirements at petitioner's specified site.[2] Channel 288C2 is short spaced to Channel 288A, Station KXKX, Knob Noster, Missouri. However, the license for Station KXKX, Channel 288A, was modified in MM Docket 89-550 to specify operation on Channel 289C3, 6 FCC Rcd 4920 (1991), and again in MM Docket 92-156, 7 FCC Rcd 7238 (1992), to specify Channel 289C2. The reference site for Channel 289C2 is fully spaced to Channel 288C2 at Moberly. Station KXKX, Knob Noster, also holds a construction permit for Channel 289C3 that is fully spaced to Channel 288C2 at Moberly. Therefore, the grant of a license for Station KZZT(FM) at Moberly on Channel 288C2 may be withheld until Station KXKX, Knob Noster, is licensed on its new channel. We shall also propose to modify the construction permit for Station KZZT(FM), Channel 288C3, to specify operation on Channel 288C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, we believe it would serve the public interest to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Moberly, Missouri, as reflected below:

	Channel No.	
City	Present	Proposed
Moberly, Missouri	284C, 288C3	284C, 288C2

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Bick Broadcasting Company
119 North Third, Box 711
Hannibal, Missouri 63401
(licensee of Station KXKX,
Knob Noster, Missouri)

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 11, 1993,** and reply comments on or before **June 28, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John R. Wilner
Bryan Cave
700 Thirteenth Street, N.W., Suite 700
Washington, D.C. 20005-3960

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presenta-

[1] The license for Station KZZT(FM), Moberly, was modified in MM Docket 89-550 to specify operation on Channel 288C3. *See* 6 FCC Rcd 4920 (1991). The construction permit for Station KZZT(FM), Channel 288C3, expires on August 21, 1993.

[2] The coordinates for Channel 288C2 at Moberly are 39-25-45 and 92-22-49.

tion is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-91

In the Matter of

Amendment of Section 73.202(b), RM-8197
Table of Allotments,
FM Broadcast Stations.
(Berlin, De Forest and
Wautoma, Wisconsin)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: March 25, 1993; Released: April 20, 1993

Comment Date: June 11, 1993
Reply Comment Date: June 28, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by De Forest Broadcasting Company ("petitioner") requesting the allotment of Channel 226A to De Forest, Wisconsin, as that community's first local transmission service. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed allotment will provide De Forest with its first local transmission service. Channel 226A can be allotted to De Forest, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules provided Channel 272A is substituted for Channel 226A at Wautoma, Wisconsin, and Channel 284A is substituted for Channel 272A at Berlin, Wisconsin.[1] There is a site restriction 1.9 kilometers (1.2 miles) north of De Forest to prevent a short spacing to Station KATF, Channel 225C1, Dubuque, Iowa. Wautoma Radio Company is the sole applicant for Channel 226A at Wautoma, Wisconsin (File No. BPH-880421NZ).[2] The substitution at Wautoma can be made in compliance with the Commission's spacing requirements at the applicant's current site.[3] The applicant for Channel 226A at Wautoma will be permitted to amend its application to specify the new Class A channel and retain its cut-off protection. Station WISS-FM, Berlin, operates on Channel 272A. Channel 284A can be substituted for Channel 272A at Berlin, Wisconsin, in compliance with the Commission's spacing requirements at the current site for Station WISS-FM.[4]

3. Whenever an existing licensee is ordered to switch frequencies in order to accommodate a new channel allotment, we require the proponent of a new allotment to make a commitment that it will reimburse the affected station for costs incurred in changing frequencies. Petitioner has acknowledged its responsibility to reimburse Station WISS-FM, Berlin, for the reasonable costs in changing frequency if petitioner is the successful applicant for Channel 226A at De Forest.[5]

4. We believe the public interest would be served by proposing the allotment of Channel 226A to De Forest, Wisconsin, since it could provide the community with its first local transmission service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below:

	Channel No.	
City	Present	Proposed
Berlin, Wisconsin	272A	284A
De Forest, Wisconsin	---	226A
Wautoma, Wisconsin	226A	272A

5. IT IS ORDERED, That pursuant to Setion 316(a) of the Communications Act of 1934, as amended, Kingsley S. Murphy, Jr., the licensee of Station WISS-FM, Wautoma, Wisconsin, SHALL SHOW CAUSE why the license should not be modified to specify operation on Channel 284A in lieu of Channel 272A.

6. Pursuant to Section 1.87 of the Commission's Rules, Kingsley S. Murphy, Jr., may not later than **June 11, 1993,** file a written statement showing with particularity why the authorization should not be modified as proposed in the *Order to Show Cause*. The Commission may call upon Kingsley S. Murphy, Jr. to furnish additional information. If Kingsley S. Murphy, Jr. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Kingsley S. Murphy, Jr. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

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[1] The coordinates for Channel 226A at De Forest are 43-16-08 and 89-20-09.

[2] Channel 226A was substituted for Channel 222A at Wautoma in MM Docket 89-548. *See* 6 FCC Rcd 5783 (1991).

[3] The coordinates for Channel 226A at Wautoma are 44-04-18 and 89-17-30.

[4] The coordinates for Channel 284A at Berlin are 43-56-55 and 88-59-09.

[5] In accordance with Commission policy, the ultimate permittee of FM Channel 226A at De Forest is responsible for reimbursement for the expenses incurred by Station WISS-FM in changing channels. *See Circleville, Ohio*, 8 FCC 2d 159 (1967).

Kingsley H. Murphy, Jr.
WISS-FM
207 Textile Bldg.
119 North 4th Street
Minneapolis, Minnesota 55401

Wautoma Radio Company
981 Howard Street
Green Bay, Wisconsin 54303
(Applicant for Channel 226A, Wautoma, Wisconsin)

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **June 11, 1993,** and reply comments on or before **June 28, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard J. Hayes, Jr.
13809 Black Meadow Road
Greenwood Plantation
Spotsylvania, Virginia 22553

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate

of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-92

In the Matter of

Amendment of Section 73.202(b), RM-8205
Table of Allotments,
FM Broadcast Stations.
(Howe, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 25, 1993; Released: April 20, 1993

Comment Date: June 11, 1993
Reply Comment Date: June 28, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Maple Communications Limited Partnership ("petitioner"), permittee of Station KHYI-FM, Channel 237A, Howe, Texas, requesting the substitution of Channel 237C3 for Channel 237A at Howe and modification of petitioner's construction permit for Station KHYI-FM to specify operation on the higher powered channel.

2. We believe the public interest would be served by proposing the substitution of Channel 237C3 for Channel 237A at Howe, Texas, since it could provide the community with a wide coverage area FM service. Channel 237C3 can be allotted to Howe in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.0 kilometers (7.5 miles) south to accommodate petitioner's desired site.[1] As requested, we also propose to modify petitioner's construction permit for Station KHYI-FM to specify operation on Channel 237C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Howe or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Howe, Texas	237A	237C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 11, 1993,** and reply comments on or before **June 28, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Margaret M. Graves
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 237C3 at Howe are North Latitude 33-23-58 and West Longitude 96-35-51.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Roberto Pizano
6513 La Mesa Circle
Tampa, FL 33634
for Forfeiture

FORFEITURE ORDER

Adopted: March 22, 1993; Released: April 20, 1993

By The Commission:

I. INTRODUCTION

1. The Commission has before it a request urging the Commission "to mitigate the amount imposed as a fine in this cause to the minimum allowable by law...." *See Response to Notice of Apparent Liability (Response)*. An NAL in the amount of $8,000 was issued to Roberto Pizano pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 503(b), for operating an unlicensed station on 7080.8 kHz in willful violation of Section 301 of the Act, 47 U.S.C. § 301. *See* 7 FCC Rcd 2571 (1992).

2. The appropriate amount for this forfeiture is eight thousand dollars.

II. BACKGROUND

3. Mr. Pizano has admitted that he was responsible for conducting unauthorized transmissions on the 40 meter amateur band as part of political propaganda efforts against the Castro regime in Cuba by a group of Cuban former prisoners called the "Federacion Mundial de Ex-presos Politicos Cubanos" (the Federation).

III. DISCUSSION

4. In his *Response*, Mr. Pizano admits liability but urges the Commission to reconsider the amount of the proposed forfeiture in light of the downward adjustment criteria set out in Section 1.80(b)(4) and in the interest of justice. Mr. Pizano argues that the public interest in supporting a Cuban "freedom-fighter" who is dedicated to liberating his country should outweigh the Commission's regulatory interests. He also argues that because of his position in the Federation, levying a forfeiture against him would be tantamount to levying it against the group and would therefore be unjust.

5. Section 1.80(b)(4) states that in determining the amount of the forfeiture the Commission must consider "the nature, circumstances, extent and gravity of the violations and, with respect to a violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." This Rule requirement is reflected in the Commission's policy guidelines for the assessment of forfeitures. *See Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR2d 823 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

6. Mr. Pizano has not only acknowledged culpability, but appears to argue that his actions are justified because of the goals of the organization on whose behalf he claims to be acting. He further asserts that broadcasting is necessary for the success of his organization's activities. These arguments are irrelevant. Mr. Pizano also asserts, but offers no evidence to support his assertion, that he is totally unable to pay *any* fine. *See Response*, p.7. The only figures he provides address the Federation's financial standing and not his own; since it is Mr. Pizano and not the Federation who is liable for the forfeiture, we find the *Response* unpersuasive in this regard. In any event, no figures were presented to show that the Federation is unable to pay.

7. Accordingly, pursuant to Section 503(b) of the Communications Act, IT IS ORDERED, that Roberto Pizano, of Tampa Florida, FORFEIT to the United States the sum of eight thousand ($8,000) for operating an unlicensed station in violation of Section 301 of the Communications Act.

8. Payment must be made within 30 days of receipt of this Order. Payment should be made by check or money order payable to the Federal Communications Commission, and must be mailed to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

9. Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit, 47 U.S.C. § 504(a).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-575

In re Applications of

HARRISCOPE OF CHICAGO, INC. *et al.* File No. BRCT-820802J9
A Joint Venture d/b/a
VIDEO 44

For Renewal of License of
Station WSNS-TV, Channel 44
Chicago, Illinois

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1993; Released: April 20, 1993

By the Commission: Commissioner Marshall not participating; Commissioner Duggan issuing a separate statement.

I. BACKGROUND

1. This memorandum opinion and order declines to designate a basic qualifications issue against Video 44 based on alleged violations of 18 U.S.C. § 1464 and renews Video's broadcast license.

2. In this proceeding, Video 44 seeks renewal of its license to operate Station WSNS-TV, Channel 44, Chicago, Illinois. At issue is WSNS-TV's performance for the 1979-1982 license term, during the course of which Video 44 instituted subscription television (STV) programming.[1] Only one question remains in this proceeding: whether an issue should be designated against Video 44 for presenting obscene programming in violation of 18 U.S.C. § 1464.[2] The programmming in question involves so-called adult-oriented movies presented during Video 44's late-night STV operation.

3. The procedural history of the obscenity question is quite complex. This proceeding was originally a comparative renewal proceeding, in which the challenger, Monroe Communications Corporation, disputed Video 44's entitlement to a renewal expectancy based on WSNS-TV's programming record, especially its STV operation. Monroe alleged among other things that adult-oriented movies presented during STV operation were indecent.

4. In its consideration of this case, the Review Board found that the concept of indecency did not apply to scrambled STV programming presented late at night. However, the Board further found that the record contained *prima facie* evidence that the programming in question was obscene. *Video 44*, 102 FCC 2d 408, 410-11 ¶ ¶ 4-5 (Rev. Bd. 1985). In particular, the Board relied on a description of the movie *Pandora's Mirror*, which indicated that virtually the entire film was devoted to sexual acts and related activities. *Id.* at 413-15.

5. The Commission granted interlocutory review of the Board's ruling and deleted the obscenity issue. *Video 44*, 103 FCC 2d 1204, 1209-11 ¶ ¶ 10-13 (1986). The Commission held that as a matter of policy it would not attempt to determine in the first instance whether material is obscene and would instead defer to local authorities. The Commission noted no local prosecution against Video 44.

6. Upon reconsideration, the Commission modified its approach. *Video 44*, 3 FCC Rcd 757, 758-59 ¶ ¶ 11-14 (1988). The Commission stated that it wished to retain the ability to pursue a range of options in response to allegations that a station had presented obscene programming and that these options included denial of license. Nonetheless, the Commission held that it would take action only where there were *prima facie* complaints filed contemporaneously with the transmission at issue. *Id.* at 759 ¶ ¶ 15-21. There, the Commission found that most of the complaints in the record were filed after the end of the pertinent license term. Additionally, the Commission found that those complaints that were timely filed lacked sufficient information to make out a *prima facie* complaint. *Id.* at 759 ¶ ¶ 22-24. The Commission reaffirmed this approach in a memorandum opinion and order granting renewal of Video 44's license. *Video 44*, 4 FCC Rcd 1209, 1212-13 ¶ ¶ 33-37 (1989).

7. On review, the United States Court of Appeals for the District of Columbia Circuit rejected the Commission's treatment of the obscenity question. *Monroe Communications Corp . v. FCC*, 900 F.2d 351, 356-59 (D.C. Cir. 1990). The court held that the Commission had not adequately justified its policy of considering only contemporaneous complaints as applied in this proceeding. Moreover, in the court's view, the record of this case contained complaints that would have warranted further investigation.

8. After remand from the court of appeals, however, the Commission did not have occasion to revisit the obscenity question. Pursuant to other aspects of the court's mandate, the Commission reexamined Video 44's entitlement to a renewal expectancy and concluded that Monroe prevailed over Video 44 on comparative grounds. *Video 44*, 5 FCC Rcd 6383 (1990), *recon. denied*, 6 FCC Rcd 4948 (1991). Because Video 44 could not prevail in any event, the obscenity question became moot. 5 FCC Rcd at 6385 ¶ 19.

9. While this case was again pending before the court of appeals, Video 44 and Monroe entered into a settlement agreement calling for the dismissal of Monroe's application. Upon approval of the settlement, this case became an

[1] In the STV mode, the signal is scrambled so that only paying subscribers supplied with a decoder can receive the programming.

[2] Because this case involves programming presented during the 1979-82 license term, it is governed by 18 U.S.C. § 1464, which prohibits the utterance of obscene, indecent, or profane language by means of radio communication. In 1988, Congress enacted 18 U.S.C. § 1468, which specifically prohibits the distribution of obscene matter by means of cable television or subscription services on television. *See* Pub.L. 100-690 (Nov. 18, 1988).

ordinary renewal proceeding and the obscenity question again became relevant. *Video 44*, FCC 92I-097 (Dec. 24, 1992). Accordingly, in connection with the settlement, Video 44 filed a motion asking the Commission to resolve the obscenity question in its favor.[3]

II. MOTION FOR RESOLUTION OF ISSUE

10. Video 44 contends that there is no basis for designating an obscenity issue against it. According to Video 44, the Court of Appeals invalidated the Commission's reliance on a contemporaneous complaint standard only with respect to the comparative consideration of WSNS-TV's record and not with respect to Video 44's basic qualifications. Moreover, Video 44 asserts that the record before the Commission does not present a *prima facie* showing of obscenity.

11. Even assuming that the record presents a *prima facie* question of obscenity, Video 44 argues that there is no substantial and material issue on which a hearing needs to be held. Video 44 maintains that: (1) there is no justification for considering programming presented more than 10 years ago; (2) adult-oriented programming was an accepted feature of STV operation, and Video 44 took appropriate precautions in presenting this material; (3) even if the Commission found a violation of 18 U.S.C. § 1464, it would not be disqualifying; and (4) since terminating its STV operation, WSNS-TV's performance has been exemplary.

12. The Mass Media Bureau supports Video 44's motion. The Bureau asserts that the facts before the Commission do not warrant denial of Video 44's license.[4]

III. DISCUSSION

13. We find that the facts before us concerning Video 44's adult programming do not raise a substantial and material question of fact as to whether it is qualified to remain a licensee. We will therefore grant renewal of Video 44's license.

14. The provisions of 47 U.S.C. § 309(d) set forth a two-pronged test to determine whether a hearing issue should be designated against an applicant. *See Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988). Under the first prong of the test, the Commission must determine whether there are specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. If the allegations satisfy this threshold, the Commission must then determine, on the basis of the application, the pleadings filed, and other matters which it may officially notice, whether a substantial and material question of fact is presented. In other words, we must determine whether the totality of the evidence raises a sufficient doubt on the point that further inquiry is called for.

15. We find that, even assuming that there is a *prima facie* case that Video 44's programming violated 18 U.S.C. § 1464, the totality of the evidence indicates that there is no reasonable possibility that further proceedings would lead to a conclusion that Video 44 lacks the basic qualifications to remain a Commission licensee. *See United States v. Wheeler*, 795 F.2d 839, 840 (9th Cir. 1986) (a substantial question is one that is fairly debatable or fairly doubtful). In this regard, it bears noting that the Mass Media Bureau, the only party remaining in this proceeding besides Video 44, believes that Video 44 should be found basically qualified.

16. First, the pleadings before us indicate that further hearings would not disclose probative evidence that could support a finding that Video 44 committed widespread violations of 18 U.S.C. § 1464. In an obscenity adjudication, the allegedly obscene material itself ordinarily constitutes the primary evidence. As the Supreme Court observed: "Simply stated, hard core pornography . . . can and does speak for itself." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973).

17. Here, with one exception, the allegedly obscene material no longer exists. According to the pleadings, the films were routinely erased after broadcast in the normal course of business pursuant to the film distribution contracts. *See Opposition to Petition to Enlarge Issues*, filed December 20, 1985, by Video 44, and attachments thereto. While other copies of the films at issue no doubt could be found, they would not be probative here, since the licensee edited those copies that were carried on WSNS-TV. Tr. 803, 857, 932, 1139-41. Thus, there would be no assurance that the edited films, as actually carried, were obscene.

18. Only one film, *Pandora's Mirror*, the one relied on by the Board, is available for Commission review. It would not be appropriate to generalize about the character of the films presented by Video 44 based on a single film. Each film is a separate work and, in view of the First Amendment implications, entitled to an independent evaluation. *See United States v. Various Articles of Obscene Merchandise, Schedule No. 2098*, 536 F. Supp. 50, 53 (S.D.N.Y. 1981). At minimum, we would require a representative sample of the films presented to make a valid judgment. *See United States v. Various Articles of Obscene Merchandise, Schedule 2102*, 709 F.2d 132, 137 (2d Cir. 1983). Even if we found that *Pandora's Mirror* were obscene, we would not disqualify Video 44 based on a single violation, standing alone. *See e.g., Liability of San Francisco Century, L.P.*, 7 FCC Rcd 4857 (1992) (notice of apparent liability), *aff'd*, 8 FCC Rcd 498 (1993) ($25,000 forfeiture assessed against station KMEL(FM) for the broadcast of radio show containing indecent material, contrary to § 1464). *See also Broadcast Action*, Report No. 21429 (Jul 22, 1992) (voluntary assignment of station KMEL(FM) approved on the same day that the notice of apparent liability was adopted).

19. The other evidence available here is insufficiently specific to make the difficult and sensitive determination that the licensee's programming violated 18 U.S.C. § 1464.

---

[3] Now before the Commission are: (1) a Motion for Resolution of Remaining Issues and Grant of Video 44's Application, filed October 28, 1992, and (2) comments, filed November 6, 1992 by the Mass Media Bureau.

[4] The Bureau, however, disagrees with Video 44's interpretation of the court's mandate. The Bureau contends that the court directed the Commission to consider the relevance of the allegedly obscene programming with respect to Video 44's basic qualifications. We agree with the Bureau that Video 44's interpretation represents an unduly restrictive reading of the plain language of the court's opinion.

See Miller v. California, 413 U.S. 15, 24 (1973). The record indicates that WSNS-TV received several complaints regarding its adult programming. Monroe Exh. 30. The record also contains descriptions of the movies taken from the WSNS-TV program guide. Monroe Exh. 6. This evidence, however, merely establishes the general character of the programming. Such a generalized showing, in itself, does not support a finding of obscenity. *See Sonderling Broadcasting Corp.*, 41 FCC 2d 777, 784 ¶23 (1973), *aff'd sub nom. Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975) (a sanction was not imposed merely because the station carried sexually-oriented programming, but because the station broadcast obscene and indecent material during its program).

20. Second, the facts before us indicate that there is no risk that Video 44's conduct would be repeated. Because of changing marketplace and technological factors, the STV format is now defunct.[5] *See Video 44*, 4 FCC Rcd at 1212 ¶ 28 (1989). There is therefore no need to deter either Video 44 or other similarly situated licensees who might have instituted STV programming from committing violations such as those alleged here.[6] *See Character Qualifications*, 102 FCC 2d 1179, 1228 ¶ 103 (1986), *recon. denied*, 1 FCC Rcd 421 (1986) (deterrence is an important element of the character qualifications process). Additionally, we have no indication, beyond the allegations here, that Video 44, has engaged in any conduct implicating its basic qualifications.

21. In view of the foregoing, we conclude that the totality of the evidence before us does not raise a substantial and material question as to Video 44's basic qualifications to remain a Commission licensee. We will therefore renew Video 44's license to operate station WSNS-TV.

IV. ORDERS

22. ACCORDINGLY, IT IS ORDERED, That the Motion for Resolution of Remaining Issues and Grant of Video 44's Application, filed October 28, 1992, by Video 44 IS GRANTED and the application of Video 44 for renewal of license (File No. BRCT-820802J9) IS GRANTED.

23. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In re: Applications of HARRISCOPE OF CHICAGO, INC.

Our renewal of Video 44's license today brings the tortured history of this case to an abrupt end. Eight years of litigation revolved around, but never resolved, the question of whether this station aired obscene movies and, if so, whether it should remain a Commission licensee.

I concur in the result we reach today, solely because of the unfortunate lack of evidence remaining in this case. I remain troubled, however, by the notion that a television station might use its federal license to transmit sexually explicit material, even on a subscription basis.

Those who are curious about the Commission's attitude about such use of a license should let our entire recent history of indecency enforcement, and not the renewal of this license, be their guide in judging how we will continue to treat such matters.

[5] WSNS-TV itself discontinued STV operation and initiated a highly-regarded Spanish language format on July 1, 1985. *Video 44*, 6 FCC Rcd at 4950 ¶15 (1991).

[6] We have no reason to believe that licensees operating in the conventional TV mode present the type of programming involved in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Merrill T. See — FOIA Control No. 91-163
On Request for Inspection
of Records

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1993; Released: April 20, 1993

By the Commission:

1. The National Association of Business and Educational Radio, Inc. (NABER) and the Special Industry Radio Service Association, Inc. (SIRSA) are two out of twenty-five frequency coordinators certified by the Commission to assist applicants in finding frequencies for private land mobile radio services. *See Report and Order in PR Docket No. 83-737*, 103 FCC 2d 1093 (1986), *recon. denied, Memorandum Opinion and Order*, 61 RR2d 148 (1986). In September 1990, the FCC's Inspector General (IG) conducted a survey audit of the Commission's frequency coordination program. As part of the survey audit, the IG reviewed records requested from NABER and SIRSA.[1] The IG set forth the results of his survey audit in a report dated January 29, 1991.

2. By Freedom of Information Act (FOIA) request dated July 21, 1991, Mr. Merrill T. See sought access to the survey audit report and to the notes, drafts, and raw data used in preparing the report. On September 3, 1991, the IG transmitted to Mr. See a copy of the survey audit report. On February 5, 1992, the IG released 381 additional pages of material, but withheld other documents pursuant to Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4). In particular, the IG withheld an internal financial statement dated June 30, 1990 that was prepared for NABER by a certified public accounting firm[2] a similar document prepared for SIRSA dated December 31, 1989;[3] and certain revenue and expense figures for 1988 and 1989 contained in another document provided by SIRSA.[4] Mr. See has filed an Application for Review of the IG's determination.[5] NABER and SIRSA have filed oppositions.

3. As fully discussed in the underlying decision, Exemption 4 of the FOIA protects "commercial or financial information obtained from a person [which is] privileged or confidential." 5 U.S.C. § 552(b)(4). The privileged or confidential test is met if disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

4. The IG indicated that, although applicants for private land mobile radio services generally rely on designated coordinators to identify available frequencies, NABER and SIRSA compete with other frequency coordinators for the provision of coordination services. *See* 47 C.F.R. § 90.621(g)(3)(iv). Moreover, the IG noted that the culmination of a pending Commission proceeding may generate increased competition among coordinators.[6] In these circumstances, the IG concluded that the release of the financial information contained in the withheld records would likely result in substantial competitive harm to NABER and SIRSA. The IG explained that the information could assist other coordinators and potential competitors to ascertain the bases for the current fee policies followed by NABER and SIRSA. Moreover, the IG found that the information could enable all potential competitors to develop strategies for the provision of frequency coordination services that would undercut NABER and SIRSA's competitive posture.

5. On review, Mr. See does not address the reasons given by the IG for withholding the records at issue. Mr. See only reiterates his opinion that NABER and SIRSA are "monopolies" and receive no competition from other frequency coordinators. After thoroughly reviewing the record before us, it is our conclusion that Mr. See has presented no reasons to disturb the IG's determination.

6. In view of the foregoing, the Application for Review filed by Mr. Merrill T. See IS DENIED. Mr. See may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

7. The officials responsible for this action are the following Commissioners: James H. Quello, Chairman, Sherrie P. Marshall, Andrew C. Barrett, and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] No other frequency coordinator was included in the survey audit.

[2] This document contains financial data for periods of time during 1989 and 1990.

[3] This document contains financial data for the years 1988 and 1989.

[4] The initial decision inadvertently stated that the figures pertained to 1989 and 1990.

[5] The IG withheld other documents under Exemptions 2 and 5 of the FOIA, 5 U.S.C. § 552(b)(2),(b)(5). Mr. See does not seek review of this aspect of the IG's decision.

[6] *See In the Matter of Frequency Coordination in the Private Land Mobile Services, Notice of Proposed Rulemaking*, 4 FCC Rcd 6325 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-109

In the Matter of

HONUS SHAIN

Licensee of Station WKLO(AM)
Danville, Kentucky

Order to Show Cause Why the
License for Station WKLO(AM)
Danville, Kentucky Should
Not be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: April 7, 1993; Released: April 21, 1993

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, has before him for consideration: (a) the license held by Honus Shain, for Station WKLO(AM), Danville, Kentucky; and (b) the results of an investigation into WKLO(AM)'s silent status.[1]

2. The Commission's records indicate that WKLO(AM) has been off the air since August 18, 1989. The licensee's last request for authority to remain silent was granted through December 18, 1992 by letter, dated September 18, 1992, from the Chief, AM Branch, Audio Services Division, Mass Media Bureau. In that letter, Mr. Shain was advised that any future requests for authority to remain silent must be accompanied by a detailed summary of steps being taken to return WKLO(AM) to on-air operations. Mr. Shain has not requested an extension of his authority to remain silent and, consequently, WKLO(AM) has been silent without authority since December 18, 1992. In his previous correspondence with the Commission, Mr. Shain stated that he was financially unable to return WKLO(AM) to the air. It appears that no substantial progress has been made by Mr. Shain to return WKLO(AM) to on-air status and that he does not have the capability to resume broadcast operations. Furthermore, because WKLO(AM) has been off the air without authority and Mr. Shain has not surrendered his license, Mr. Shain is in apparent violation of Sections 73.1740(a)(4)[2] and 73.1750[3] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, Honus Shain is DIRECTED TO SHOW CAUSE why the license for Station WKLO(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Honus Shain has the capability and intent to expeditiously resume broadcast operations of WKLO(AM) consistent with the Commission's Rules.

(b) To determine whether Honus Shain has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Honus Shain is qualified to be and remain the licensee of Station WKLO(AM).

4. IT IS FURTHER ORDERED, That the Mass Media Bureau SHALL SERVE upon the licensee, within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That to avail himself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary."

[3] Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

of this Order a WRITTEN APPEARANCE stating that he will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving his right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[4]

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WKLO(AM), Danville, Kentucky, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

[4] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-110

In the Matter of

H. GIBBS FLANDERS, JR.,
TRUSTEE

Licensee of Station WJHH(AM),
Soperton, Georgia

Order to Show Cause Why the
License for Station WJHH(AM),
Soperton, Georgia, Should
Not be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: April 7, 1993; Released: April 21, 1993

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, has before him for consideration: (a) the license held by H. Gibbs Flanders, Jr., for Station WJHH(AM), Soperton, Georgia; and (b) the results of an investigation into WJHH(AM)'s silent status.[1]

2. The Commission's records indicate that WJHH(AM) has been off the air since June 8, 1990. Requests for authority to remain silent had been renewed through July 22, 1991, because the station was under the control of Mr. H. Gibbs Flanders, a Chapter 7 Bankruptcy Trustee, who was administrating the estate of the former licensee of WJHH(AM), Holiday Broadcasting Systems, Inc. Mr. Flanders stated that the bankruptcy estate was financially unable to return WJHH(AM) to the air and that he was seeking to sell the station and assign its license. Mr. Flanders did not request a further extension of his silent authority until April 16, 1992, and again on September 30, 1992. These requests have not been acted upon because Mr. Flanders has failed to respond to Commission requests for additional information needed to complete processing.[2] By letters, dated July 23, 1992 and September 25, 1992, the Chief, AM Branch, Audio Services Division, Mass Media Bureau, requested that Mr. Flanders submit information concerning his compliance with Section 73.1740 (Minimum Operating Schedule) and Section 73.1750 (Discontinuance of Operation) of the Commission's Rules. Mr. Flanders responded, by letter dated September 30, 1992, stating that the bankruptcy estate for which he is trustee entered into an arrangement to assign the WJHH(AM) license to Mr. Terry Meeks on June 26, 1991, and that since that date the bankruptcy estate has had no involvement with the station. However, no application has ever been filed for Commission consent to assign the WJHH(AM) license and it appears, from the record before us, that Mr. Flanders does not intend to do so. Therefore, it does not appear that the broadcast operations of WJHH(AM) will be resumed. Further, in view of the fact that WJHH(AM) has been off the air without authority for an extended period of time and the licensee has not surrendered its license, Mr. Flanders is in apparent violation of Sections 73.1740(a)(4)[3] and 73.1750[4] of the Commission's Rules.

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, H. Gibbs Flanders, Jr., Trustee, is DIRECTED TO SHOW CAUSE why the license for Station WJHH(AM) should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether H. Gibbs Flanders, Jr., Trustee, has the capability and intent to expeditiously resume broadcast operations of WJHH(AM) consistent with the Commission's Rules.

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[1] The Mass Media Bureau has been delegated authority to issue and release Show Cause Orders in cases involving silent broadcast stations. *See Debrine Communications, Inc.*, 7 FCC Rcd 2118 (1992).

[2] Mr. Flanders has failed to certify that he is not subject to a denial of federal benefits pursuant to the Anti-Drug Abuse Act of 1988, 21 U.S.C. Sec. 862(a). This certification is required of every individual making an application to the Commission. *See In the Matter of Amendment of Part 1 of the Commission's Rules to Implement Section 5301 of the Anti-Drug Abuse Act of 1988*, 6 FCC Rcd 7551 (1991).

[3] Section 73.1740(a)(4) provides:

> "In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[4] Section 73.1750 provides:

> "The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation."

(b) To determine whether H. Gibbs Flanders, Jr., Trustee, has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether H. Gibbs Flanders, Jr., Trustee, is qualified to be and remain the licensee of Station WJHH(AM).

4. IT IS FURTHER ORDERED, That the Mass Media Bureau SHALL SERVE upon the licensee, within thirty (30) days of the release of this Order, a BILL OF PARTICULARS, with respect to the issues specified above.

5. IT IS FURTHER ORDERED, That, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the BURDEN OF PROCEEDING with the introduction of evidence and the BURDEN OF PROOF with respect to the issues specified above shall be upon the MASS MEDIA BUREAU.

6. IT IS FURTHER ORDERED, That to avail himself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, SHALL FILE with the Commission within thirty (30) days of the receipt of this Order a WRITTEN APPEARANCE stating that he will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file a written appearance within the time specified, or within thirty (30) days of receipt of this Order the licensee files a written statement expressly waiving his right to a hearing, the licensee's right to a hearing SHALL BE DEEMED TO BE WAIVED. In the event the right to a hearing is waived, the Presiding Judge, or the Chief Administrative Law Judge if no Presiding Judge has been designated, SHALL TERMINATE the hearing proceeding and CERTIFY this case to the Commission in the regular course of business, and an appropriate Order shall be entered.[5]

7. IT IS FURTHER ORDERED, That, if it is determined that the hearing record does not warrant an Order revoking the license for WJHH(AM), Soperton, Georgia, it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER OF FORFEITURE shall be issued against the licensee in an amount not exceeding $250,000.00 for the willful and/or repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this document constitutes a NOTICE OF APPARENT LIABILITY for willful and repeated violation of Section 73.1740 and/or 73.1750 of the Commission's Rules. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, it shall, as a matter of course, include a forfeiture notice so as to maintain the fullest possible flexibility of action. Since the practice of including such forfeiture notice is a routine procedure, such inclusion here should not be viewed in any manner as suggesting or otherwise indicating what the initial or final disposition of this proceeding should be.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

[5] The Mass Media Bureau has been delegated authority to issue Revocation Orders in cases involving silent broadcast stations. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n.3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-115

In re Applications of

CONCORD-CARLISLE REGIONAL SCHOOL DISTRICT (WIQH)
Concord, Massachusetts
(Hereafter "Concord-Carlisle")

Has: 88.3 MHz; Channel 202D
0.001 kW; 7 Meters (H&V)

Req: 88.3 MHz; Channel 202A
0.100 kW; 7 Meters (H&V)

File No. BPED-860424MC

TECHNOLOGY BROADCASTING CORPORATION (WMBR)
Cambridge, Massachusetts
(Hereafter "Technology")

Has: 88.1 MHz; Channel 201A
0.360 kW; 87 Meters (H&V)

Req: 88.1 MHz; Channel 201A
0.720 kW; 90 Meters (H&V)

File No. BPED-920326IA

For Construction Permits

HEARING DESIGNATION ORDER

Adopted: April 8, 1992; Released: April 21, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for modification of facilities filed by non-commercial, educational FM stations.[1]

2. *Concord-Carlisle.* On March 26, 1992, Emerson filed comments with respect to Concord-Carlisle's application. On April 9, 1992, Concord-Carlisle filed a response to Emerson's comments. Emerson filed a Reply on April 22, 1992. Emerson recognizes that Concord-Carlisle is obligated by Section 73.318(b) of the Commission's rules to resolve complaints of interference within one year from the commencement of program test authority within the blanketing area. However, above and beyond the requirements of 47 C.F.R. § 73.318(b), Emerson seeks Concord-Carlisle's active involvement in resolving complaints of interference within the "interference radius" of the increased facilities of station WIQH. Specifically, Emerson desires that Concord-Carlisle, during the first year following the commencement of Program Test Authority, resolve, at its own expense, complaints of interference to WERS(FM) caused by WIQH. The types of remedies envisioned by Emerson that should be employed by Concord-Carlisle would include, but not be limited to, installation of tuneable filters or traps on receivers and antenna reorientation. Emerson also desires that Concord-Carlisle subsidize receiver or antenna upgrades if they are necessary to resolve complaints of interference. Additionally, contemporaneously with the commencement of Program Test Authority, Emerson desires that Concord-Carlisle notify, via mail, all residents and businesses within 700 meters of WIQH's transmitter site, that it will provide free remedial assistance to anyone unable to receive the signal of WERS(FM) because of interference caused by WIQH. Furthermore, beyond the first year after the commencement of Program Test Authority, Emerson desires that Concord-Carlisle continue to participate in resolving isolated complaints of interference to WERS(FM) by WIQH.

3. Emerson has not objected to the waiver of 47 C.F.R. § 73.509 granted by the Commission on February 11, 1992. Furthermore, pursuant to 47 C.F.R. § 73.318(b), Concord-Carlisle is required to resolve complaints of interference within its blanketing area for a period of one year from commencement of program test authority. In addition, the Commission will address any actual interference com-

[1] Concord-Carlisle's application, as originally filed on November 11, 1985, was returned by the Chief, FM Branch on March 24, 1986 because it would have resulted in prohibitive overlap in violation of 47 C.F.R. § 73.509 to station WERS(FM), licensed to Emerson College ("Emerson"). On April 24, 1986, Concord-Carlisle, requested reconsideration of the return of its application and requested a waiver of Section 73.509, which was granted by the staff on February 11, 1992. On March 7, 1990, Technology filed a petition to deny Concord-Carlisle's application. Technology alleged that if Concord-Carlisle's proposal was granted, WMBR(FM) would be precluded from expanding its existing facilities. On February 11, 1992, the Chief, Audio Services Division waived the provisions of 47 C.F.R. § 73.509 and granted Concord-Carlisle's request for reconsideration without considering the allegation raised in Technology's petition. We note, however, that even had the substance of Technology's petition been considered by the Chief, Audio Services Division, it would not have altered the reconsideration decision. The potential preculsionary impact by applications for noncommercial educational FM stations on future expansion by existing stations is considered in the context of our processing procedures. These procedures permit other stations to file mutually exclusive competing applications to upgrade their own facilities in response to Commission cut-off notices issued pursuant to 47 C.F.R. § 73.3573(e). Technology appears to have recognized this when it elected to file its application in response to Concord-Carlisle's established cut-off date and thus seek comparative consideration for its proposed expansion of the facilities of WMBR(FM).

plaints when the license application for WIQH is filed. Thus, we find that the interference concerns of Emerson are adequately protected and its request for additional relief will be denied. However, this action notwithstanding, Emerson may wish to effectuate a private contractual agreement with Concord-Carlisle with respect to the instant proposition.

4. Neither applicant has indicated an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed Reg 49560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a time-sharing issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time arrangement.

5. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

6. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

9. IT IS FURTHER ORDERED, That the request for relief filed by Emerson College IS DENIED.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of

MONTGOMERY COUNTY MEDIA NETWORK, INC. d/b/a IMAGISTS	File No. BPCT-841129KF
CARMEN MATIAS AND ANDREW N. WIMBISH, JOINTLY	File No. BPCT-841129KK
WOOD BROADCASTING COMPANY	File No. BPCT-841129KW
G-A COMMUNICATIONS, INC.	File No. BPCT-841129LE

For Construction Permit
for New UHF Television Station,
Conroe, Texas

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1993; Released: April 21, 1993

By the Commission: Commissioner Marshall not participating.

1. The above captioned proceeding involving applications for a new UHF television station in Conroe, Texas is pending before the Commission. In an Initial Decision, Administrative Law Judge Edward Luton disqualified Wood Broadcasting Company on a financial issue, and preferred Carmen Matias and Andrew N. Wimbish, Jointly (Matias-Wimbish) over Imagists and G-A Communications, Inc. (GAC), and two other applicants that subsequently dismissed their applications, on the standard comparative issue. *DLBS Incorporated*, 3 FCC Rcd 6710 (ALJ 1988).

2. GAC, Imagists, and Wood filed exceptions to the Initial Decision with the Review Board. After hearing oral argument, the Board remanded the proceeding to the ALJ "[t]o determine whether JoAnn Garcia [a principal of GAC], lied to, misrepresented facts to, or lacked candor with respect to the Blanco, Texas comparative television (Channel 52) proceeding [cite omitted]; and, if so, the effect thereof on the basic qualifications of [GAC] to be a Commission licensee." *Imagists*, 4 FCC Rcd 3749, 3752-53 ¶ 13 (Rev. Bd. 1989). In a Supplemental Initial Decision, Judge Luton disqualified GAC on the misrepresentation issue. *Imagists*, 6 FCC Rcd 2963 (ALJ 1991).

3. The Review Board affirmed both the ALJ's disqualification of GAC on the lack of candor and misrepresentation issues, and those portions of the initial decision disqualifying Wood on the financial issue and preferring Matias-Wimbish over Imagists on the standard comparative issue. *Imagists*, 6 FCC Rcd 7440 (Rev. Bd. 1991). GAC and Imagists seek Commission review of the Review Board's decision. Wood has not filed an application for review; the Board's denial of its application is therefore final.

4. Based upon our review of the pleadings before us,[1] we agree with the Board's disqualification of GAC on the lack of candor and misrepresentation issues.[2] We find, however, that Matias-Wimbish's April 14, 1986 site amendment was not supported by good cause, as required by section 73.3522(b)(i) of the Commission's rules for post-designation amendments. We therefore dismiss Matias-Wimbish's application for lack of a transmitter site and award the construction permit to Imagist, inasmuch as it is the only basically qualified applicant.

5. *Background:* When Matias-Wimbish filed its application on November 29, 1984, it specified a transmitter site that was 22 miles short-spaced. Alerted to the short-spacing by the filing on January 16, 1985 of an Informal Objection by Association of Maximum Service Telecasters (AMST), the applicant did not file an amendment specifying a properly spaced site until April 14, 1986. In response to an "air hazard" determination from the FAA, Matias-Wimbish filed a second amendment on May 14, 1986, reducing the height of its proposal tower from 1150 to 750 feet.

6. The ALJ orally accepted the first amendment on May 13, 1986, but initially rejected the second amendment, holding that it did not meet the requirement of 73.3522(b)(i) that engineering amendments must be necessitated by events that the applicant could not have reasonably foreseen. *DLBS Incorporated*, FCC 86M-2184 ¶ ¶ 8-12 (July 8, 1986). In particular, the ALJ faulted Matias-Wimbish for not discovering that, more than a year before its April 1986 site amendment, the FAA had refused to approve a competing applicant's proposed location of an 1150 foot tower at a nearby site and ultimately approved only a 745 foot tower at that site. In the initial decision, however, the ALJ reversed himself and accepted Matias-Wimbish's May 1986 height amendment, concluding that "Matias-Wimbish's 'carelessness' had nothing to do with its ability to anticipate the FAA's later expressed disinclination to approve a 1,150 foot tower." *DLBS Incorporated*, 3 FCC Rcd at 6720 ¶ ¶ 129-30. Citing *Women's Broadcasting Coalition*, 59 RR 2d 730 (1986), the ALJ reasoned that "there

[1] The following pleadings have been filed: (a) application for review, filed January 17, 1992, by Montgomery County Media Network d/b/a Imagists; (b) application for review, filed January 22, 1992, by G-A Communications, Inc.; (c) opposition to application for review, filed February 6, 1992, by the Mass Media Bureau; (d) opposition to application for review of G-A Communications, filed February 6, 1992, by the Mass Media Bureau; and (e) consolidated opposition to applications for review, filed February 6, 1992, by Carmen Matias and Andrew N. Wimbish.

[2] Because we agree that GAC is not basically qualified, there is no need to consider its claim that the ALJ erred in concluding that Matias-Wimbish's proposal is comparatively superior to GAC's.

was a reasonable possibility of FAA clearance ... until the time of the FAA action." *Id.* at ¶ 130. Quoting extensively from the initial decision, the Board upheld the ALJ's acceptance of the amendment. 6 FCC Rcd at 7450 ¶ ¶ 43-45.

7. *Discussion:* For the reasons set forth below, we reverse the Board and the ALJ on this point. We find that Matias-Wimbish's April 14, 1986 amendment specifying a transmitter in compliance with the minimum mileage separation requirements of section 73.610 of the Commission Rules is not supported by good cause. We therefore dismiss Matias-Wimbish's application for lack of a suitable transmitter site, without determining whether its subsequent May 14, 1986 amendment reducing its antenna height to secure FAA clearance also lacked good cause.

8. To establish good cause for a post-designation amendment, "the applicant must demonstrate that it has acted with due diligence, that the amendment was not required by its voluntary act, that no additional issues or parties would be required, that the hearing process will not be disrupted, that there will be no prejudice to competing applicants, and that the applicant will not gain a comparative advantage." *California Broadcasting Corp.*, 90 FCC 2d 800, 808 ¶ 17 & n.28 (1982), citing *Erwin O Conner*, 22 FCC 2d 140, 143 ¶ 7 (Rev. Bd. 1970). Section 73.3522(b)(i) of the Rules provides that, in addition to the usual good cause requirements, the applicant must also show that engineering amendments are required by events that the applicant could not have reasonably foreseen.

9. The April 14, 1986 site amendment meets some of these criteria without difficulty in that its acceptance did not require the addition of any parties or issues, and the amending applicant would not gain a comparative advantage. However, the amendment was required by the applicant's voluntary act inasmuch as it initially selected a grossly short-spaced site.[3] Likewise, the applicant failed to exercise due diligence in waiting fifteen months after learning that its original site was short-spaced to amend to a properly spaced site. Even the ALJ, who had orally accepted the amendment, later acknowledged that the applicant had not displayed diligence "of a high order" in this respect. *DLBS Incorporated*, FCC 86M-2184 at ¶ 7. He explained, however, that "where an applicant is attempting to cure a potentially disqualifying defect in its application, diligence should be interpreted in light of the equities of the case." *Id.* at ¶ 5, citing *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489 (1981). Although noting that "[i]t is difficult to find... any equities in favor of Matias-Wimbish," the ALJ found that the applicant had nevertheless acted with due diligence because "this is not a situation in which the applicant did absolutely nothing during the passage of time." *Id.* at ¶ 7.

10. To the extent that the ALJ suggested that the diligence standard is more lenient where an applicant seeks to cure a potentially disqualifying defect, we have modified our former practice of liberally accepting post-designation amendments that cure disqualifying defects, such as the loss of a transmitter site or a financial commitment.[4] Originally concerned with promoting the broadest choice of applicants in an effort to obtain the optimum in ultimate service to the public, we have tempered this objective somewhat in view of our "responsibility to provide service to the public in the most efficient, expeditious manner possible.[5] As we have previously stated, "[t]emporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." [6] This delay "exact[s] an economic toll on both the Government and the applicants," [7] in that "the public is deprived of a valued service, and the ultimate licensee is deprived of the opportunity to provide that service" during the selection process.[8]

11. Thus, we do not allow "applicants ... to inordinately delay the processing of applications from applicants who are willing and able to proceed with the prosecution of their applications."[9] In our view, defective proposals disserve the public interest, even if, as in this case, any such deficiencies are remedied before the start of the evidentiary hearings.[10] In this regard, a competing party has a valid interest in the prompt resolution of a proceeding that is prejudiced if it must consider multiple proposals from a single applicant.[11] Indeed, any time and expense that an applicant devotes to preparing for the evidentiary hearing based on an opponent's initial proposal is forfeited if that proposal is amended. The clear waste of private and public resources that this entails is exacerbated in multiparty proceedings where a site change by one applicant affects the hearing preparations of a large pool of competing applicants. This delays service to the public even if the amendment does not require additional hearings, additional or modified issues, or the addition of new parties. Liberally permitting curative amendments further undermines our efforts to reduce the time and money devoted to our com-

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[3] In *Eugene Walton*, 6 FCC Rcd 6071, 6075 ¶ 16 (Rev. Bd. 1991), review denied, 7 FCC Rcd 3237 (1992), the ALJ's denial of an applicant's request for a waiver of the short-spacing rules was held to be reasonably foreseeable (and the applicant thus failed to establish good cause for a site amendment under section 73.3522(b)), given Commission precedent that such waivers are granted only if suitable, properly spaced sites are shown to be unavailable and strong public interest considerations are shown to support the waiver and given the applicant's failure to even attempt either showing. Like the unsuccessful applicant in *Walton*, Matias-Wimbish cannot meet the unforeseeability test of section 73.3522(b): It not only specified a site that was 22 miles short-spaced (Walton's site was short-spaced by 35 meters), it also neglected to request a waiver which, given the extent of the short-spacing, would have likely been denied. Thus, the site amendment was required by Matias-Wimbish's voluntary act (i.e., specifying a short-spaced site) and the need for that amendment was clearly foreseeable.

[4] *Aspen FM, Inc.*, 6 FCC Rcd 1602, 1603-04 ¶ ¶ 12, 13 & n.5 (1991).

[5] *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 ¶ ¶ 2-3 (1986).

[6] *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134-35 n.7 (1985).

[7] *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 164 ¶ 53 (1991).

[8] *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 5 FCC Rcd 4050 ¶ 3 (1990).

[9] *Cuban-American Limited*, 5 FCC Rcd 3781, 3782 ¶ 5 (1990).

[10] See, e.g., *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991), review denied, 7 FCC 3237 (1992), holding that a site amendment submitted well before the start of the evidentiary hearings but ten months after the applicant discovered the short-spacing was not supported by good cause.

[11] See *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1031 ¶ 6 (Rev. Bd. 1983), aff'd sub nom. *Royce International Broadcasting Company*, 820 F.2d 1332 (D.C. Cir. 1987).

parative process to the extent that it discourages future applicants from exercising the maximum possible care in formulating their proposals.

12. Given our heightened concern with avoiding undue delays that retard the provision of new service, we take this opportunity to review what constitutes due diligence under section 73.3522(b). As an initial matter, an applicant must show that it acted promptly after it discovered, or it should have discovered, the potentially disqualifying deficiency.[12] Clearly, an applicant that sits idly by, either doing nothing or pursuing a course of action that is not likely to resolve the problem expeditiously, lacks diligence.[13]

13. We recognize that some defects can be cured more readily than others. Thus, how quickly an applicant must act in order to establish diligence will necessarily vary depending on the facts of each case.[14] We have accorded the ALJs broad authority to regulate the course of multiparty proceedings, permitting them to adopt appropriate procedures to facilitate the prompt performance of their responsibilities. *Cuban-American Limited*, 5 FCC Rcd at 3782 ¶ 5. As a result, the ALJs have discretion to decide in the first instance whether an applicant has acted with sufficient promptness upon learning of a deficiency in its original proposal, and we will generally not substitute our judgment for that of a presiding officer. We emphasize, however, that the general guideline governing such determinations is clear -- that the agency has a public interest obligation to provide new service to the public as expeditiously as possible.

14. In view of the foregoing, we urge applicants, whenever possible, to submit curative amendments no more than 30 days after they learn, or should have learned, of the deficiency requiring an amendment.[15] An applicant waiting more than 30 days to file a petition for leave to amend should be prepared to explain the need for additional time, and it may be asked to document that, despite its failure to amend within 30 days, it took immediate steps upon learning of the deficiency.[16] We note further that, in the absence of unusual circumstances, a delay of more than six months has long been presumed to be excessive.[17] Therefore, an applicant seeking to amend more than six months after the defect was, or should have been, discovered would have a heavy burden of establishing due diligence.

15. Turning to the specific facts of this case, the ALJ found, and the Board agreed, that Matias-Wimbish had demonstrated due diligence because "this [wa]s not a situation in which the applicant did absolutely nothing" upon learning of the short-spacing. *DLBS Incorporated*, FCC 86M-2184 at ¶ 7; *Imagists*, 6 FCC Rcd at 7451-52 n.6. While we do not question the validity of this observation,[18] we find that the "quantity and quality" of Matias-Wimbish's efforts to obtain a properly spaced site fall far short

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[12] Compare *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5193 ¶ 20 (1991) (delay in amending to a new site is not excused where the applicant had not bothered to check the status of its FAA application, relying instead on its engineer to advise it of any deficiency) with *Radio Lake Geneva Corporation*, 7 FCC Rcd 5586, 5589-90 ¶ ¶ 13-14 (Rev. Bd. 1992), review denied, FCC 93-155 ¶ 2 & n.3 (rel. March 26, 1993) (applicant that chose to "fight rather than switch" on the FAA's tentative air hazard finding exercised due diligence in amending within 30 days of the final Determination of Air Hazard, where its dealings with the FAA were sufficiently reasonable, prudent and diligent to establish good cause for its site amendment); *Harrison County Broadcasting Co.*, 6 FCC Rcd 5819 (Rev. Bd. 1991), review denied, 7 FCC Rcd 2993 (1992) (applicant exercised due diligence in amending to correct the geographic coordinates of its transmitter site within 30 days of receiving *actual* notice in the Hearing Designation Order that its engineer had plotted coordinates outside of the actual boundaries of the property selected as its site).

[13] See *Texas Communications*, 6 FCC Rcd at 5193-94 ¶ ¶ 21-22 (applicant that spent eight months looking for a site that would solve the FAA's excessive height and EMI problems, rather than immediately reducing its antenna height, lacked due diligence); *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991), review denied, 7 FCC Rcd 3237 (1992) (applicant that waited ten months for action on its facially deficient waiver request, rather than immediately amending to a properly spaced site, lacked due diligence); *Goodlettsville Broadcasting Co.*, 5 FCC Rcd 4593, 4593-94 ¶ 8 (1990) (applicant that chose to recalculate its original site based on new rules that it knew, or should have known, were not yet effective, rather than amending to a properly spaced site within the time prescribed by the ALJ, lacked due diligence); *Cuban-American Ltd*, 5 FCC Rcd 3781, 3782 ¶ ¶ 10-12 (1990) (applicant that sought after the ALJ's deadline to amend to a new site, rather than reducing its antenna height upon being advised by its engineer that the FAA would not approve a tower that tall, lacked due diligence).

[14] Compare *Elijah Broadcasting*, 3 FCC Rcd 5148 (Rev. Bd. 1988), review denied, 5 FCC Rcd 5351 (1990) (site amendment accepted where the six month delay in amending to a new transmitter site was due to special problems -- that is, the area's rapid development, strict architectural standards, and FAA considerations -- in locating a complying site); with *Texas Communications*, 6 FCC Rcd at 5193 ¶ 19 (site amendment rejected where no reason offered at the hearing for an eight month delay in amending to new site after the applicant learned of the FAA's rejection of its original site).

[15] This is consistent with section 1.65 of the rules, which affords applicants 30 days in which to *report* any matter of decisional significance, and with section 73.3522(b), which affords applicants 30 days after the designation order to file amendments addressing any matter raised therein as a matter of right and provides that amendments filed more than 30 days after the designation order must be supported by good cause.

[16] See *Capitol City Broadcasting Co.*, 6 FCC Rcd 5525 (Rev. Bd. 1991), rev. denied, 7 FCC Rcd 2629 ¶ 3 & n.2 (1992), in which we upheld the dismissal of an application for not timely amending its financial proposal, where the applicant had not documented its claim to have exercised due diligence in obtaining new financing.

[17] *California Broadcasting*, 90 FCC 2d at 808 ¶ 19, in which the Commission agreed that the failure to amend to a new site for more than six months would ordinarily not constitute due diligence, but nevertheless found due diligence because the applicant began exploring new sites promptly after the *unforeseeable* creation of a national park deprived it of its original site. See also *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1328 (1978) (six month delay in filing a site amendment held not to constitute due diligence, given the applicant's continued reliance on a site that he knew was unavailable).

[18] Compare *Texas Communications*, 6 FCC Rcd at 5193 ¶ ¶ 20-21 (delay not excused where the applicant had not bothered to check on the status of its request for FAA clearance); *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991), review denied, 7 FCC Rcd 3237 (1992) (applicant did not display due diligence waiting 10 months to amend to a properly spaced site in filing a facially deficient waiver -- and waiting for action on that request -- instead of promptly amending to a properly spaced site); with *Elijah*, (delays attributable to difficulties in locating new site are not fatal to a finding of due diligence).

of due diligence.[19] It is undisputed that Matias-Wimbish delayed almost 5 months after the *Hearing Designation Order*, FCC MM-0792 (November 13, 1985) -- and 15 months after AMST's Informal Objection alerted it that the original site was short-spaced -- before amending to a properly spaced site. As noted above, even the ALJ, who accepted the amendment, acknowledged that Matias-Wimbish had not displayed diligence of a high order in this respect. *Memorandum Opinion and Order*, FCC 86M-2184 (July 8, 1986). The Board, on the other hand, found due diligence because, once the applicant learned of the deficiency, it hired an engineering firm to find a new site and "closely superintended their search for a site, contacting them twelve times by telephone and six times by letter." 6 FCC Rcd at 7451-52 n.6.

16. We disagree with the Board's characterization of these efforts as constituting close supervision of the engineering firm's site search. Over a period of more than a year, Matias-Wimbish claims to have contacted the firm a total of eighteen times (that is, an average of less than twice a month). It does not allege that it repeatedly reminded the firm of the urgency of this matter, let alone explored the reason for the delay or discussed how the site search might have been expedited. Nor does Matias-Wimbish allege any special problems that would explain its 15-month delay in amending to a new site, a length of time that far exceeds what we have long considered excessive. Rather, it states that, after receiving the Informal Objection in January 1985, it consulted an engineering firm, which confirmed in February or March 1985 that the specified site was in fact short-spaced and recommended that a new site be secured. At that time, the applicant hired the engineering firm to find a new site, believing it to be in a better position to negotiate with rural landowners than Wimbish who was concerned that predominantly white rural landowners would be unwilling to lease to him. The applicant alleges that the firm contacted six landowners on its behalf, but that the firm did not locate a suitable site until April 1986. In the 15 months that elapsed until the site amendment was filed, the applicant apparently did nothing more than urge the firm, through a series of letters and telephone calls, to pursue the matter.

17. We do not fault Matias-Wimbish for retaining an engineering firm to assist in locating a new site. But, in the absence of any special circumstance explaining why it took 15 months to find a new site, we cannot find that such retention, in conjunction with the applicant's relatively meager efforts to expedite the firm's site search, establishes due diligence, particularly since none of the other applicants in this multi-party proceeding appear to have experienced similar delays in finding suitable sites. Thus, we reverse the ALJ's ruling, deny Matias-Wimbish's April 14, 1986 Petition for Leave to Amend, and reject its April 14 amendment.[20] Lacking a suitable fully-spaced site, Matias-Wimbish's application is not grantable and must therefore be dismissed.

18. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 C.F.R. § 1.115(g) of the Commission's Rules, the application for review filed January 17, 1992 by Montgomery County Media Network d/b/a Imagists IS GRANTED to the extent indicated above and DISMISSED in all other respects;[21] and that the application for review filed January 22, 1992 by G-A Communications, Inc. IS GRANTED in part and DENIED in part.

19. IT IS FURTHER ORDERED, That the ALJ's ruling accepting the amendment, filed on April 14, 1986, by Carmen Matias and Andrew N. Wimbish, Jointly IS SET ASIDE, the petition for leave to amend IS DENIED, and that the attached amendment IS REJECTED.

20. IT IS FURTHER ORDERED, That the Review Board's Decision, *Imagists*, 6 FCC Rcd 7440 (Rev. Bd. 1991), IS MODIFIED, as set forth herein; that the grant of Matias-Wimbish's application (File No. BPCT-841129KK) IS SET ASIDE; that the application filed by Carmen Matias and Andrew N. Wimbish, Jointly (File No. BPCT-841129KK) IS DISMISSED; that the application of Montgomery County Media Network d/b/a Imagists (File No. BPCT-841129KF) IS GRANTED; and that the application of G-A Communications, Inc. (File No. BPCT-841129LE) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[19] There is no merit, however, to Imagists' claim that the Bureau should have dismissed Matias-Wimbish's application pursuant to section 73.3566(a), which provides for the dismissal of applications that are determined to be patently not in accordance with FCC rules unless accompanied by an appropriate waiver request. (Matias-Wimbish specified a short-spaced site, but it did not file a spacing waiver request.) In the case of television applications, as opposed to FM applications, it is appropriate to accept a television application specifying a short-spaced site, and make any waiver determination relating to that site at the hearing. *North Texas Media v. FCC*, 778 F.2d 28, 34 (D.C. Cir. 1985); *Kenter*, 62 RR 2d 1573 (1986).

[20] This case is distinguishable from *Radio Associates, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991), where the Board, having rejected the claim that the applicant was entitled to file an amendment as a matter of right, remanded the case so that the applicant could make a good cause showing. In contrast, there was never a question as to the need for a good cause showing in this case. Aware that it was required to make such a showing, Matias-Wimbish singularly failed to establish that it proceeded with due diligence. It is not entitled to a further opportunity to bolster its showing at this late date.

[21] Having concluded that Imagists is the only basically qualified applicant, those portions of its application for review dealing with the comparative issue are moot and have not been considered.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

DIAL-A-PAGE, INC. File No. 163500-92-1-A-BFW

Notice of Apparent Liability for
Forfeiture Penalty for Station KUC891
in the Public Land Mobile Service at
Mt. Pleasant, Texas

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1993; Released: April 22, 1993

By the Commission:

I. INTRODUCTION

1. Dial-A-Page, Inc. (Dial) has filed a "Petition for Reconsideration and Remission" (Petition) and a "Supplement to Petition" (Supplement) in response to the $40,000 forfeiture proposed by a "Notice of Apparent Liability for Forfeiture" (*NALF*) released on March 31, 1992. *See Dial-A-Page, Inc.*, 7 FCC Rcd 2204 (1992). For the reasons stated below, we grant in part Dial's Petition and reduce the forfeiture to $32,000.

II. BACKGROUND

2. On January 12, 1989, Dial filed an application for authority to add an additional location for Station KUC891 to operate on frequency 152.24 MHz at Mt. Pleasant, Texas (Mt. Pleasant). Dial constructed the Mt. Pleasant station pursuant to Section 22.43(d) of the Commission's Rules. While Dial was allowed to construct the facility, it was required, pursuant to Section 22.43, to wait for Commission authorization to operate the facility. Dial, in contravention of Section 22.43, began operating before receiving authorization. On April 2, 1991, a Commission engineer from the Dallas, Texas, Field Office (Dallas FO) who was investigating television interference (TVI) complaints in the Mt. Pleasant area contacted Dial regarding the unauthorized operation of the facility. Dial turned off the transmitter on April 3, 1991.[1]

3. The *NALF* stated that apparent violations of Section 301 of the Communications Act (the Act) and Sections 22.43(d)(6) and 22.9(b)(1) of the Commission's Rules[2] had occurred because Dial commenced operation without authorization, that Dial did not notify the Commission of commencement of operations, and that Dial's operation constituted willful and repeated conduct within the terms of Section 503(b) of the Act. The *NALF* explained that pursuant to the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for operation at an unauthorized location is $40,000 and that no adjustments to the figure appeared to be appropriate. Consequently, the *NALF* established a $40,000 forfeiture.

III. DIAL PETITION

4. Dial asserts that one of its employees apparently incorrectly believed the application had been granted and wrongly activated the transmitter on or about February 28, 1991. Dial adds that no existing or potential subscribers were provided service. Dial claims that the Commission usually seeks additional information from a licensee prior to issuing a NALF but did not do so in this case. It also argues that the *NALF* was adopted in violation of law because the forfeiture amount is based upon the *Policy Statement* which is an *ex post facto* application of new standards purporting to be a policy change not subject to normal rule-making procedures required by the Administrative Procedure Act (APA). It also attacks the *Policy Statement* because radio common carriers pay forfeitures far out of proportion to the gravity of the violation involved, especially as compared to other categories of regulated entities.

5. Dial further argues that the Commission failed to consider the factors mandated by Section 503(b) of the Act in establishing an appropriate forfeiture amount. It asserts that the transmitter operated without authorization from February 28, 1991, to April 3, 1991, but the *NALF* was issued on March 31, 1992, thereby placing the bulk of the violation period outside of the one-year period of limitations established by Section 503(b)(6)(B). According to Dial, the only part of the unauthorized period that should

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[1] The Mobile Services Division (MSD) granted Dial's application on April 4, 1991, before the Dallas FO engineer brought Dial's unauthorized operation to the attention of the MSD.

[2] Section 301 of the Act provides in relevant part:

> No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Section 22.43(d)(6) of the Rules states:

> *Commencing operation.* Applicants constructing facilities without prior Commission authorization pursuant to Section 22.43(d), shall not commence operating such facilities until after the Commission issues an authorization and the applicant complies with the notification requirements of Section 22.9(b)(1) of the rules.

Section 22.9(b)(1) of the Rules provides that:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

be cognizable by the Commission was April 1, 2, and 3, 1991. Dial also contends that it has been a Commission licensee since June 1981, operates radio common carrier systems in four States, and has a long history of compliance with the Commission's Rules, but that the Commission has failed to take this into account.

6. Dial also contends that the proposed forfeiture amount is inconsistent with the $8,000 amount in *MobileComm of Memphis, Inc.*, 7 FCC Rcd 1499 (Mob. Serv. Div. 1992) (*MobileComm*), which Dial asserts, was decided under the *Policy Statement* and is a comparable case.[3] According to Dial, the apparent factual distinctions between MobileComm and Dial require imposing a lighter penalty on Dial because MobileComm was invited to negotiate its penalty and allowed to pay a forfeiture of $8,000 without a finding of wrongdoing whereas Dial "is treated like an outlaw" and ordered to forfeit $40,000 without any opportunity for discussion.[4]

IV. DISCUSSION

7. The requesting of additional information from Dial prior to issuance of the *NALF* was unnecessary. All the necessary facts were available and at our disposal. Dial does not dispute the factual background and circumstances which were set forth in the *NALF* and has admitted its violation.[5]

8. In 1989, Congress amended the Act to increase substantially the maximum amounts of forfeitures that may be imposed under Section 503(b) and other sections of the Act.[6] The 1989 increases in the Commission's forfeiture authority placed licensees on notice that violators of the Act or Commission rules could be subject to substantial forfeitures. The *Policy Statement* merely reflects the statutory Section 503(b) increases. Therefore, contrary to Dial's assertion, the *Policy Statement* imposes no *ex post facto* application of any new standards. *Teton Communications, Inc.*, 8 FCC Rcd 591 (1993); *Standards for Assessing Forfeitures*, 6 FCC Rcd 7016 n.5 (1991) (*Order* denying request for stay). In addition, the Commission has already rejected arguments that the *Policy Statement* was adopted in violation of the APA. *Policy Statement Reconsideration Order*, 7 FCC Rcd at 5339-40.

9. We reject Dial's suggestion that its violation does not constitute willful and repeated conduct because it resulted from employee error. Section 312(f) of the Act, which also applies to Section 503(b) of the Act,[7] provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

Therefore, the fact that a licensee's violation occurred through inadvertence does not prevent it from being willful; all that is necessary is that the licensee know that it was doing the act in question. *See Southern California Broadcasting Co., supra.* There is no dispute that a violation of Section 22.9(b)(1) has occurred. The fact that the misconduct was attributable to an employee is not relevant. A licensee is fully responsible under the doctrine of *respondeat superior*, whether or not violations were intentional or inadvertent. *See, e.g., David A. Bayer*, 7 FCC Rcd 5054 (1992). Regarding "repeated conduct," Section 312(f)(2) of the Act provides:

> the term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well.[8] There is no dispute that Dial's action, *i.e.*, operating without Commission authorization, continued for more than one day within one year prior to issuance of the *NALF* and by its very terms, Section 312(f)(2) deems such an action to be "repeated". Therefore, Dial's arguments concerning the "bulk of the violation period" being outside the one-year statute of limitations period and its three-day "cognizable unauthorized period" are irrelevant because the forfeiture assessed was not based on the counting of the days. Indeed, no upward adjustment was made for the repeated nature of the offense. *See generally Policy Statement* (forfeiture deter-

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[3] In *MobileComm*, the MSD and MobileComm reached an agreement resolving matters in a Consent Decree. Concerning the alleged wrongdoing in that proceeding, the MSD believed that a *prima facie* case existed establishing that MobileComm had operated six control antennas at an unauthorized location. The Consent Decree was for purposes of settlement only with MobileComm's signing not being an admission of any violation, and MobileComm agreed to make a voluntary contribution to the U. S. Treasury to end the matter.

[4] In its Supplement, Dial cites *Donald W. Bishop*, 7 FCC Rcd 2546 (1992) (*Bishop*) ($10,000 NALF for willful unlicensed transmission on aviation frequencies), *Richard E. Mattice*, 7 FCC 2572 (1992) (*Mattice*) ($16,000 NALF for transmitting false distress signals using an unlicensed marine station), and *Emmis Broadcasting Corp. of St. Louis*, 6 FCC Rcd 2289 (1991) (*Emmis*) ($25,000 NALF for false broadcast saying the United States was under nuclear attack) in commenting on its perception that the amount of Dial's forfeiture assertedly is inappropriate when viewed against the *Bishop*, *Mattice*, and *Emmis* forfeitures. Further, Dial cites to the Commission's Order denying reconsideration of the *Policy Statement* and claims that the Commission's intention to apply the *Policy Statement* guidelines flexibly in deciding every forfeiture case based on specific facts and equities presented applies to Dial's case.

[5] Prior to issuance of the *NALF*, MSD staff requested from the Dallas FO copies of correspondence between Dial and the Dallas FO involving the latter's investigation of the TVI complaints and discovery of Dial's unauthorized Mt. Pleasant transmitter. The Dallas FO submitted the requested material to the MSD, which contained various Dial statements given to the Dallas FO.

[6] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (signed into law Dec. 19, 1989). The Commission amended Section 1.80 of its Rules to reflect the Section 503(b) increases. *Amendment of Section 1.80 of the Commission's Rules to Modify Forfeiture Amounts*, 5 FCC Rcd 3708 (1990).

[7] *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

[8] *See* H. R. Rep. No. 97-765, 97th Cong., 2d Sess. 50-51 (1982).

mined by base amount which can be adjusted upward by varying percentage for repeated violations). For statute-of-limitation purposes in assessing the proposed Dial forfeiture, there can be no dispute that Dial repeated its violation for at least three days, (*i.e.*, April 1, 2, and 3, 1991).[9]

10. We reject Dial's assertion that the *MobileComm* case is a basis upon which to reduce Dial's forfeiture. Contrary to Dial's assertion, that case was not decided under Section 503(b) or the *Policy Statement* because it involved an agreed-upon Consent Decree as opposed to issuance of a NALF. Moreover, MobileComm did not agree that a violation existed but was willing to sign a consent decree to end the potential for litigation. Further, neither Section 503(b) nor the *Policy Statement* entails any ascribing of a dollar amount per day for a forfeiture.

11. As to Dial's Supplement,[10] the *Mattice*, and *Emmis* cases are not relevant because they involved forfeitures under the *Policy Statement's* "Other" category of violations whereas Dial's proposed forfeiture was assessed under the *Policy Statement's* "Common Carrier" category, and *Emmis* was released prior to issuance of the *Policy Statement*. Moreover, the base forfeiture amounts for common carriers set forth in the *Policy Statement* reflect the higher maximum amounts for common carriers set by Congress when it increased the Commission's forfeiture authority and also permissibly imposes higher penalties on common carriers than on other entities for comparable offenses. In *Bishop*, the Commission, unlike here, assessed the statutory maximum. (Here, the statutory maximum would be $300,000.)

12. We do, however, accept Dial's contention that the forfeiture should be adjusted downward for its "history of overall compliance." We find nothing in the Commission's records contradicting Dial's claim in this regard. Consequently, we apply a downward adjustment criterion to account for Dial's history of overall compliance and reduce the forfeiture by 20 percent, *i.e.*, $8,000, to $32,000. Dial has justified reduction of the forfeiture based upon history of overall compliance but, based on the specific facts and equities here, and taking into account the factors set forth in the *Policy Statement* and Section 503(b) of the Act,[11] has not justified remission or reduction on any other grounds. As a result, we reduce the forfeiture from $40,000 to $32,000.

V. ORDERING PARAGRAPHS

13. Accordingly, IT IS ORDERED that the petition for reconsideration in the above-captioned proceeding, filed by Dial-A-Page, Inc. IS GRANTED IN PART and IS DENIED in all other aspects.

14. IT IS FURTHER ORDERED pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. Sec. 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, that Dial-A-Page, Inc. SHALL FORFEIT to the United States the sum of thirty two thousand dollars ($32,000) for violation of Section 301 of the Communications Act and Sections 22.43(d)(6) and 22.29(b)(1) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument, noting the above-captioned file number on its payment, to the Commission within thirty (30) days of the release date of this Order, payable to the order of the Federal Communications Commission, at: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

15. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. Sec. 504(a).

16. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Dial-A-Page, Inc., 111 East 13th Street, P.O. Box 987, Russellville, AR 72801, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[9] Dial's reference to *Aircall Communications, Inc.*, 5 FCC Rcd 3077 (Mob. Serv. Div. 1990) to support its statute-of-limitations argument is inapposite because that case was decided before the amendments to Section 503(b) utilizing a $10-per-day forfeiture for 233 calendar days (*i.e.*, dating backward in time one year from the date the Aircall NALF was issued until Aircall finally filed its FCC Form 489) whereas the Dial *NALF* utilized the increased statutory amounts as reflected in the *Policy Statement's* $40,000 base forfeiture figure within one year of Dial's violation *vis-a-vis* the release date of the *NALF*.

[10] In filing its Supplement, Dial has requested that it be accepted, considered, and associated with its Petition. We hereby grant its request.

[11] The *Policy Statement* itself reflects the factors set forth in Section 503(b). *See Policy Statement Reconsideration Order*, 7 FCC Rcd at 5340, para. 8.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-114

In the Matter of

Review of the Commission's Rules Governing the Low Power Television Service — RM-7772

NOTICE OF PROPOSED RULEMAKING

Adopted: April 9, 1993; Released: April 22, 1993

Comment Date: June 18, 1993
Reply Comment Date: July 16, 1993

By the Commission: Commissioner Marshall not participating.

1. We institute this proceeding, partly on our own motion, and partly in response to a Petition for Rulemaking filed by the Community Broadcasters Association (CBA). We propose to amend our rules and policies for the low power television service (LPTV) in three respects. First, due to recent favorable changes in the volume and quality of applications to construct low power television stations, television translator facilities and television boosters, we now believe it is appropriate to reexamine our rules concerning the acceptance and amendment of applications for this service, including the expansion of our waiver policy regarding terrain shielding. Second, the improved processing climate also enables us to reevaluate our rules for station modifications with the aim of facilitating the construction and operation of stations in this service. Finally, in response to concerns voiced by the CBA, we consider proposals that would permit LPTV operators to request the use of standard broadcast call signs.[1]

Application Acceptance Standard

2. Since the inception of the low power television service in 1982, our staff has processed low power television applications using a strict approach known as the "complete and sufficient" acceptance standard.[2] In this *Notice*, we recognize that the volume of low power television applications has decreased and the quality of those applications improved. As a result of these changes, we believe that a more lenient standard may now be appropriate.

3. Under the present procedure, the Commission announces a "filing window" during which it receives applications for new construction permits and major changes in existing facilities.[3] *See* 47 CFR Section 73.3572(g). While the filing window is open, applicants may amend their applications at will. However, upon the close of the filing window, further opportunity to amend is extremely limited. Under the complete and sufficient acceptance standard, applications must be "letter perfect" at the close of the window, or they are returned as defective. *See* 47 CFR Section 73.3564(a). Moreover, under our current policy, amendments after the close of the window are not permitted for the purpose of curing a defective application. Accordingly, applicants who have their applications returned must wait until a subsequent filing window to resubmit their application, assuming, of course, that the proposed facility would be acceptable at that time.

4. At the time we adopted the complete and sufficient acceptance standard, there were thousands of applications on file for low power television stations, and thousands more were expected.[4] In light of this fact, we stated that the Commission's limited resources and the large number of applications would not permit the staff to "coach applicants in correcting defects or omissions in applications."[5] Further, at that time we had large groups of mutually exclusive applications.[6] Each change in technical information often required repeated processing of all mutually exclusive applications in a group, not just the application to be amended. Therefore, it was necessary to establish a system of processing applications whereby the staff could easily determine which applications were acceptable and which were not. Accordingly, we stated that there would be "strict standards for the acceptance of applications" and those not meeting this test would be returned with no opportunity to correct the defect.[7]

5. We believe that the complete and sufficient standard has now achieved its intended purpose. It has encouraged applicants to submit complete and carefully prepared applications. By significantly improving administrative effi-

[1] The CBA's petition was filed on June 11, 1991, and was placed on an August 13, 1991, Public Notice (RM-7772). In response, we received approximately 30 comments and reply comments. The CBA's petition also included proposals that would allow low power television stations which meet certain requirements to be called "community television stations," to operate with increased power and to be treated similarly to conventional stations with respect to nonengineering rules. These proposals do not warrant further consideration at this time.

[2] *See Low Power Television Report and Order ("LPTV Report and Order")*, 51 RR 2d 476 (1982), *on recon.*, 53 RR 2d 1267 (1983). *See also Rochelle C. Salzer*, 99 FCC 2d 331 (1984), *aff'd sub nom., Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985).

[3] Originally, we employed a cut off list procedure, similar to that used in the conventional television service, for the filing of low power television applications. However, due to the large volume of applications which had been filed, we established the filing window procedure in *Low Power Television and Television Translator Service ("Filing Windows")*, 102 FCC 2d 295 (1984), providing for a fixed period during which applications may be submitted.

[4] Subsequently, the volume of applications grew much greater. At the beginning of 1984, we had on file approximately 12,000 applications. Following the issuance of what was to become the Commission's final cutoff list for low power television applications in 1984, nearly 25,000 applications were filed, bringing to almost 40,000 the number of applications on file.

[5] *LPTV Report and Order*, at 502.

[6] Mutually exclusive applications are resolved through a lottery. *See Random Selection Lotteries*, 93 FCC 2d 952 (1983).

[7] *LPTV Report and Order*, at 501-2.

ciency, the strict acceptance standard permitted the processing of the substantial number of LPTV applications that were filed during the early and mid 1980's.

6. Application receipts and backlogs in the LPTV service have decreased dramatically and are now at manageable levels.[8] Further, less than twenty percent of the total number of applications received in our six national filing windows were mutually exclusive so as to require selection of permittees by lottery.[9] Because of these changed circumstances, we tentatively believe that we can now institute a more flexible processing system without causing delays in application processing and in the introduction of service to the public. Accordingly, we propose to modify our rules to provide a more lenient standard for acceptance and amendment of low power television applications.[10]

7. Under our proposal, we would continue to accept applications during filing windows. At the close of the window, the staff would continue to give public notice of those applications timely received in the filing window. However, placement on this notice would not constitute formal acceptance of an application. The staff would then begin its initial review of the applications. We propose that the applications be judged under a "substantially complete" standard. Those not meeting this standard would be returned to applicants, with no opportunity to seek reinstatement on the basis of an amendment. Under this approach, which has long been used in processing conventional television applications, applications are considered in compliance with the substantially complete standard, if they are not patently defective. *See K & L Communications, Inc.*, 70 FCC 2d 1987 (1979); *Racine Telecasting Co.*, 51 RR 2d 1205 (1982); *George E. Oleson*, 5 FCC 2d 58 (1966), *recon. denied*, 6 FCC 2d 502 (1967). This standard generally does not focus on the importance of a particular omission, but on the cumulative impact of all the omissions. *Henry M. Lesher*, 67 FCC 2d 1593 (1977). Our experience since the limitation of application filings to strict window periods and the revision of the low power television application to its present form has shown that few applications contain defects which would require return under the substantially complete standard. We invite comment on our proposal to apply a "substantial completeness" test and on what, if any, additional criteria we should adopt in the context of the low power television service.

8. Under our proposed approach, applications found to be substantially complete, but containing defects or omissions, would not be returned. Rather, applicants in this situation would be given an opportunity to cure application defects. If the defect were to prevent the staff from further processing the application, a deficiency letter would be issued affording the applicant 30 days to correct the defect. If, however, the defect did not prevent the staff from processing the application further, the staff would not send a deficiency letter until it completed pre-acceptance studies on the application, or until a subsequent defect prevented further processing. At that point, the staff would inform the applicant of all the defects, and afford the applicant 30 days to correct them. If the defects were not corrected within 30 days, the application would be returned with no further opportunity to amend. Thus, under this proposal, applicants would be afforded one 30-day period to cure the defects identified in each deficiency letter.[11]

9. If the defect involved a violation of the LPTV interference protection standards,[12] the applicant would have 30 days to resolve all predicted interference conflicts identified in a deficiency letter. Further, any amendment submitted to correct a defective application must be a minor amendment,[13] and otherwise acceptable in all respects.[14] We propose to enforce strictly the 30-day period which we are affording applicants to cure the defects in their applications. Applications, as amended to correct all defects identified by the staff, would then be listed on a public notice as "Accepted for Filing"; this would either be in the form of a lottery announcement notice, or in the case of non-mutually exclusive applications, a "proposed grant list." We note here that application deficiencies can arise after an application has been accepted for filing, either through inadvertence, or because the deficiency is not related to the acceptance standards, such as a determination that the proposed facility would cause a hazard to air safety. Under our proposal, the same policies and procedures would govern correction of deficiencies identified in the post-acceptance stage of the application process as apply at the pre-acceptance stage.

10. A possible alternative to the approach outlined above would be a mid-level acceptance standard which is not as lenient as substantially complete, but less strict than the present complete and sufficient standard. Under this hybrid approach, applications would, of course, be returned for deficiencies which would fail the substantial completeness test, set forth in paragraph 7, *supra*. In addition, this standard would mandate dismissal, without an opportunity for a correcting amendment, for certain specified defects. Thus, this approach would require specification of the defects which are considered so serious or time-consuming that correction should not be allowed. For instance, applications which do not meet the interference protection standards or which contain defects in data involved in the determination of field strength contours would generally require repeated processing if they were to be corrected.

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[8] We now have approximately 535 applications pending, the majority of which are located near the Mexican border and have been awaiting coordination with the Mexican Government. During each window we receive approximately 800 to 1200 applications.

[9] The number of applications within each mutually exclusive group has also decreased considerably. For instance, the average number of applications within each lottery group is now two or three.

[10] We note that a similar reduction in the volume of commercial FM applications we receive has resulted in our recent modification of the strict "hard look" acceptance standard which had been used in that service. *See Report and Order, Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Stations ("FM Report and Order")*, 7 FCC Rcd 5074 (1992).

[11] This assumes, of course, that any subsequent defect is not a result of the applicant's failure to amend the application properly after receiving the prior deficiency letter.

[12] *See* 47 CFR Sections 74.705, 74.707 and 74.709.

[13] *See* 47 CFR Section 73.3572(a).

[14] For instance, if the amendment eliminated the predicted interference which rendered the application defective, but resulted in predicted interference to another existing station or an earlier-filed application, the amendment would not be acceptable and the application would be dismissed without further opportunity to amend.

Allowing these types of corrections could, in some instances, require more staff time and might possibly delay initiation of service. At the other end, non-technical defects which are apparent from the four corners of the application are readily identifiable by the staff and often easily correctable by applicants. We request comments on the feasibility of such an acceptance standard in the LPTV service. We also welcome comments on approaches for defining the standard and for categorizing defects pursuant to this type of standard.

11. While we propose a more lenient standard with respect to corrective amendments, we would by no means permit such amendments for every type of defect that might arise. An application which is not substantially complete could not be cured by an amendment. Moreover, an application which has an improper fee payment or is untimely filed cannot be cured by an after-the-fact submission. *See, e.g.,* 47 CFR Section 1.1107(b).

12. For the same reasons which permit us to relax the acceptance standard for applications in the low power television service, we believe we can also remove the current restrictions regarding our acceptance of waiver requests based on terrain shielding.[15] Pursuant to *Commission Policy Regarding Terrain Shielding ("Policy Statement")*, 3 FCC Rcd 2664 (1988), *recon. granted in part*, 3 FCC Rcd 7105 (1988), the Commission waives its interference protection rules when it is apparent that, due to intervening terrain, interference to another facility would not be caused by an applicant's proposed operation. However, under our present policy, we limit consideration of waivers based on terrain shielding to applications that are not mutually exclusive with any other application submitted during the same filing window. We now believe, however, that we may be able to consider a wider range of waiver requests without sacrificing undue staff resources. Accordingly, we propose to no longer limit consideration of terrain shielding to those applications which are not mutually exclusive with other applications. In addition, we propose to extend our waiver policy by permitting applicants to consider terrain shielding as a basis for resolving situations of mutual exclusivity. Further, we propose to consider terrain shielding when raised for the first time by applicants in amendments responding to deficiency letters.

13. Our *Policy Statement* provides guidelines for demonstrating that, due to terrain shielding, a proposed facility would not be likely to cause interference to authorized broadcast stations. Basically, two methods are available to applicants: (1) letters of assent from potentially affected stations, agreeing that terrain shielding would prevent interference, but without surrendering the right to be protected against any actual occurrence of such interference, or (2) submission of detailed terrain profiles. We believe that these guidelines could also be used as a basis for waiver requests, seeking to resolve predicted interference conflicts between applications determined to be mutually exclusive before accounting for the effects of terrain. Accordingly, we propose to allow applicants to submit detailed terrain profiles for this purpose, prepared in the manner specified in the *Policy Statement*. We would also consider permitting applicants to resolve this exclusivity condition by mutual agreement that interference between two proposed facilities would not be likely due to terrain shielding. In these situations, we would not hold either applicant responsible for eliminating any interference that might occur to the other, but would expect the parties to cooperate in this regard.

14. We solicit comments on our proposals regarding application acceptance and terrain shielding waivers. We seek comment on alternative approaches for flexible acceptance standards for applications that would be consistent with the twin goals of application quality and processing efficiency. In addition, we solicit comments on the practicality of allowing applicants to amend applications which are defective due to predicted interference, and whether there are better alternatives to the approach we have outlined above. Further, we ask for comments on our proposals to extend our terrain shielding waiver policy.

Modification of Facilities

15. The Commission's rules define certain modifications to authorized facilities as major changes. *See* 47 CFR Section 73.3572(a). In the case of stations in the low power television service, major changes generally include changes in frequency (output channel),[16] operating power, transmitting antenna system, antenna height and antenna location exceeding 200 meters. However, such changes, except for a change in frequency, are not considered major if the resulting signal range of the station would not increase in any horizontal direction. In other words, changes in facilities are considered to be "minor", provided that the station's protected service contour, as modified, lies completely within its unmodified service contour.[17] Our experience with the service, however, has shown that the major change rule definition is very restrictive. Major changes were defined in a broad manner when we established the low power television service in 1982 in order to exercise strict control over the parameters of these applications. Due to the volume of pending applications and the newness of the service, we wished to limit severely the kinds of changes that could be considered minor. In view of our experience, however, we believe that we can more precisely define the rule. We believe that the technical modifications we are proposing to allow are, indeed, minor with respect to the rights of other operators and the public. A comparison with the scope of allowable minor changes in other broadcast services supports this view.

16. Accordingly, we now propose to narrow the types of changes that would be considered "major" in the LPTV service. *See* 47 CFR Section 73.3572(a)(2). Generally, we propose that any change or combination of changes in the transmission system of a low power television, television translator or television booster station, other than a change in output channel, would not be considered a major change provided: (1) the changed facility would fully comply with the low power television interference protection

[15] The term "terrain shielding" is commonly used to describe signal blockage by a substantial terrain obstruction. In contrast, the term "terrain roughness" generally involves the consideration of above average attenuation, as opposed to blockage, due to terrain irregularities.

[16] A change in frequency offset designation (plus, minus, zero or none) involves frequency changes within a broadcast channel and is, therefore, not considered a major change.

[17] *See* 47 CFR Section 74.707(a) for a definition of LPTV protected contours.

standards,[18] (2) the minor change application would not be mutually exclusive with any earlier-filed application and (3) the station's protected service contour ("footprint") resulting from the change would be suitably bounded. Presently, minor changes are bounded by a station's existing footprint; that is, the protected contour before the change. There are different ways in which the bounding criterion could be expanded to afford licensees and permittees increased flexibility to effect minor facilities changes. One such way would confine a station's modified footprint within a "bounding circle" centered at the existing antenna site coordinates. The radius of this circle would equal the largest distance from that site to the station's existing protected contour.[19] To illustrate, suppose a licensee wished to move its antenna site from point A to point B, and that the existing protected contour extended a maximum distance of 15 kilometers from point A. The changes involved in moving the facility to point B would be considered minor changes, *provided*, the new protected contour would be contained within a circle centered at point A (the old site) and having a radius of 15 kilometers (the maximum distance between the original site and protected contour). We find this approach appealing because it would facilitate changes to stations using directional antennas, thereby potentially benefitting the majority of stations in the LPTV service. Broadening the minor change allowance in this manner would permit these station operators more latitude to relocate sites or alter antenna systems without having to await a filing window, but would still preclude substantial changes in technical facilities.

17. Under our proposal to enlarge the bounds of minor changes, stations using directional antennas would be permitted to increase the extent of their footprints in particular directions. The LPTV interference protection standards would subsequently be applied to the larger service contour due to the minor change; the bounding circle itself would not be protected against interference. As a result, situations could arise where minor change applications, which may be filed outside of windows, might become entangled in interference conflicts with later-filed applications; for example, "new and major change" applications tendered in a filing window. In order to continue authorizing minor changes relatively quickly, we wish to prevent such applications from being mutually exclusive and involved in the lottery process. Therefore, we propose to consider minor change applications cut off on the date filed.[20] We recognize that this policy could adversely affect some prospective applicants whose later-filed application proposals might conflict with and be considered untimely filed to a minor change application having cut off status. Moreover, prospective applicants, at the time they file their applications, might have no way of knowing that a minor change application had been filed earlier; for example, shortly before the opening of a filing window. As a result, an applicant might design a proposed facility to avoid prohibited signal contour overlap within the existing protected contour of another facility, but would not anticipate such overlap within the latter facility's slightly larger protected contour, resulting from its pending minor change application. However, we believe that there would be relatively few such situations and that, ordinarily, these could be resolved through minor amendments. Our proposed revision to the LPTV application acceptance standard would permit such amendments to applications identified as untimely filed to other applications. Nevertheless, we propose to delay implementation of our broader allowance for minor changes until after the close of the first LPTV filing window following any adoption of these proposals. This would allow interested parties one opportunity to file applications for facilities which have already been planned in reliance on the present minor change criteria. Further, it would afford parties an opportunity to anticipate the adverse effects, if any, of a broader minor change rule in considering applications to be filed in later windows.

18. We propose to permit minor change applications to be filed during LPTV filing windows, despite the possibility that such applications could become mutually exclusive with other applications filed in the window. Thus, such minor change applications would require special handling. Our staff would determine whether the minor change would increase the extent of a station's protected contour in a horizontal direction. If so, processing of the minor change application would be deferred until the staff could determine whether that application would be mutually exclusive with any acceptable application filed in the window. In that event, the minor change application would be reclassified as a major change application and processed accordingly. We would consider these applications to be cut off from competing applications on the last day of the filing window.

19. We propose to limit the applicability of the broader minor change allowance to applications seeking minor changes in authorized facilities. Specifically, the broader allowance would be used only for the purpose of determining whether an application proposing facilities changes would qualify as a "minor change" application that could be filed outside of an application filing window. For all other purposes, including amendments to pending applications, the present bounding criteria for minor changes would continue to apply. By proceeding in this manner, station licensees and permittees would have increased opportunities to effect minor changes in their facilities without having to await a filing window, our motivation for proposing the broader allowance. Conversely, we would avoid any serious disruption of application processing which, we believe, could result if the allowance were permitted in connection with amendments to pending applications. After we have gained some experience with the broader minor change allowance, we would consider extending its applicability should circumstances so warrant.

20. We invite comments on our proposal to amend the definition of major facilities changes in the low power television service. In particular, we seek comment on whether the present distinction between major and minor changes should be modified and on alternative means for accomplishing this, including our suggested approach. Further, we ask for comment on our proposals to cut off minor change applications on the date filed and to reclassify minor change applications as "major" in the event these become mutually exclusive with applications received

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[18] 47 CFR Sections 74.705, 74.707 and 74.709.

[19] The present and proposed methods for bounding minor facilities changes are illustrated in Appendix B.

[20] In this vein, our proposed policy would be similar to the manner in which we handle applications for "displacement relief" for the low power television service. *See* 47 CFR Section 73.3572.

in filing windows. Finally, we ask whether the proposal should be limited in scope, as we have suggested, or also applied in connection with minor amendments to pending applications.

Call Signs

21. In its petition, the CBA states that low power television stations have difficulty achieving recognition of their actual audience levels because viewers are not accustomed to the five alpha-numeric character call sign employed in this service; for example, K23EF.[21] As a result, the CBA argues, the public does not accurately report the viewing of LPTV stations in ratings diaries. Moreover, the CBA states that, because audience measurement services have four- or six-letter fields for call signs in their computer databases, they cannot accept the five-character call signs used to identify low power television stations. Consequently, CBA contends, the viewing of low power television stations is not accurately reported to audience measurement services. In addition, complaints over the years from low power television broadcasters have voiced similar concerns as the CBA regarding the five-character call sign.

22. In light of these concerns, we believe that it may be appropriate to amend our rules to provide for the assignment of four-letter call signs to low power television stations. We believe that such action may be beneficial to an industry that already faces a significant competitive disadvantage due to its secondary status and its much smaller station viewing areas. It may also reduce confusion caused to viewers who are accustomed to identifying television stations by four-letter call signs. Further, we believe that the assignment of four-letter call signs would not significantly increase the administrative burden on the Commission, or exhaust the number of available call signs.[22]

23. We propose that requests for low power television call signs be handled in a manner similar to that for full service television. For instance, the "first-come-first-served" policy under Section 73.3550 would apply.[23] Accordingly, a request for an available call sign would be entertained on behalf of the first licensee who requests it. In cases where two requests for one call sign are received on the same day, the assignment would be made to the station having the longest continuous record of broadcasting operation under substantially unchanged ownership and control. Further, we would not allow low power television licensees to apply for a call sign currently in use in another broadcast service unless the stations are commonly owned, or the requesting party has the written consent of the licensee of the station whose call sign is sought. In addition, we propose to append a distinctive suffix, such as "LP", to any four-letter call signs issued to low power television stations. The insertion of these letters following the call sign should avoid any confusion with full service television stations. For purposes of determining eligibility for the proposed four-letter call signs, we request comment on the merits of two options.

24. *Option 1.* Under the first option, as proposed by the CBA, only low power television stations which have met certain threshold requirements would be entitled to apply for four-letter call signs. These requirements would include a minimum number of hours of operation as well as a certain amount of locally originated programming. Under the CBA's proposal, these stations would also have to comply with nonengineering rules applicable to full service television stations such as those involving multiple ownership, children's programming and maintenance of a studio and local public file. In requesting a call sign, licensees would certify that they had complied with the requirements. Under the CBA's approach, a review mechanism would be established to ensure ongoing compliance with these requirements.

25. *Option 2.* Under the second option, which we are inclined to favor, all licensed low power television stations would be entitled to apply for four-letter call signs, irrespective of their compliance with the nonengineering rules applicable to full service television stations. Under this approach, construction permits for low power television stations would continue to be assigned the current five-character call sign. However, upon applying for a license, a low power television station would then become eligible to receive a four-letter call sign.[24] An advantage of this option is that it would not establish a programming-based eligibility standard that would bring about the complications of administering a review system. Moreover, we see no reason to condition four-letter call sign availability on compliance with what may be unduly burdensome requirements for the LPTV service, especially since enforcing those requirements could involve substantial administrative costs.

26. We seek comment on the approaches discussed herein. We seek comment as to whether low power television licensees, in general, should be eligible to apply for four-letter call signs. We are interested in what effect this proposed policy would have on the low power television industry, as well as what effect, if any, it would have on full service television broadcasters. Finally, we request any other suggestions which might assist us in implementing the assignment of standard broadcast call signs to low power television stations.

PROCEDURAL MATTERS

27. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. We request written public comments on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis.

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[21] Section 74.783(d) provides that call signs for low power television stations "will be made up of the initial letter K or W followed by the channel number assigned to the station and two additional letters." 47 CFR Section 74.783(d).

[22] Our records show that there are ample call signs available. While there are a total of over 35,000 four-letter call signs, more than 14,000 remain unassigned. Currently there are 1250 licensed LPTV stations.

[23] *See* 47 CFR Section 73.3550(h).

[24] Because some low power television construction permits never become operational, we believe that, at a minimum, only licensed low power television stations should be able to apply for these call signs.

The Secretary shall send a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Para. 603(a) of the Regulatory Flexibility Act, P.L. No. 96-354, 94 Stat 1164, 5 USC Section 601 *et seq.* (1981).

28. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR Sections 1.1202, 1.1203 and 1.206(a).

29. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 CFR Sections 1.415 and 1.419, interested parties may file comments on or before **June 18, 1993,** and reply comments on or before **July 16, 1993**. Extensions of these time periods are not contemplated. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send your comments to Office of Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

30. For further information on this proceeding, contact Keith Larson or Ray White, Low Power Television Branch, Mass Media Bureau (202) 632-3894.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Requirements of the Regulatory Flexibility Act of 1980, the Commission finds as follows:

Reason for Action. The Commission is initiating this rulemaking to consider whether to make its low power television and television translator rules more lenient with respect to: the acceptance and amendment of defective applications; the definition of major change applications; and the assignment of four-letter call signs. Consideration of these changes is prompted by recent favorable changes in the quality and quantity of these applications and in response to a petition for rulemaking by the Community Broadcasters Association.

Objectives. The Commission seeks public comment on its tentative conclusions that the strict complete and sufficient processing procedures are no longer necessary; that a relaxed definition of major changes will allow operators increased flexibility to make facilities changes without having to await a filing window, and thereby expedite service to the public; and that four-letter call signs will be beneficial to the LPTV industry by enhancing viewer recognition.

Legal Basis. The proposed action is authorized under Sections 4(i), 4(j), 301 and 303(r) of the Communications Act of 1934, as amended, 47 USC Sections 154(i), 154(j), 301 and 303(r).

Reporting, Recordkeeping and Other Compliance Requirements. No new requirements.

Federal Rules which overlap, duplicate, or conflict with this rule. None.

Description, potential impact, and number of small entities involved. The Commission believes that the adoption of the proposals set forth in this *Notice* would benefit small entities interested in acquiring new low power television and television translator licenses and small entities already licensed for low power television and television translator facilities who wish to modify their current authorizations.

The proposal would also allow such applicants a limited opportunity to amend defective applications to correct errors.

Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives. The *Notice* solicits comments on alternatives.

APPENDIX B

Present and Proposed Criteria for Bounding Minor Changes

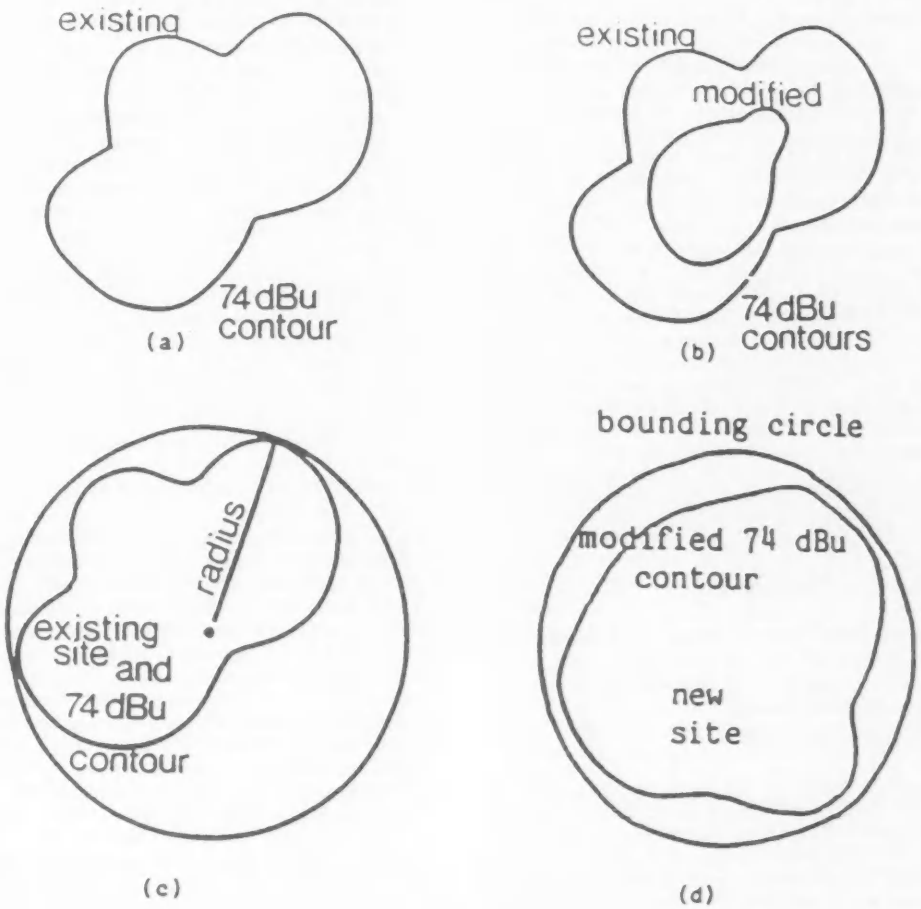

Illustration of present and proposed bounds for minor changes: (a) existing protected 74 dBu contour of UHF station. (b) present criterion - modified protected contour bounded by existing protected contour. (c) proposed criterion - bounding circle determined from existing protected contour and (d) modified protected contour (footprint) resulting from minor changes contained within bounding circle.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-591

In re Application of

NANCY NALESZKIEWICZ — File No. 10494-CL-P-430-A-89

For a construction permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunications Radio Service to serve the Kansas - 3 (Jewell) Rural Service Area

Appearances

Sheldon P. Schuman on behalf of Nancy Naleszkiewicz; *Carl W. Northrop* and *E. Ashton Johnston* on behalf of Thomas Domencich and the Committee for a Fair Lottery; *Dean George Hill* and *Timothy E. Welch* on behalf of Pacific Nationwide Cellular; and *Carmen Borkowski* on behalf of Chief, Common Carrier Bureau.

DECISION

Adopted: April 14, 1993; Released: April 27, 1993

By the Review Board: BLUMENTHAL and GREENE; Board Chairman MARINO absent.

Board Member BLUMENTHAL:

1. The Board has before it the *Initial Decision* (*I.D.*), 7 FCC Rcd 7613 (1992), of Administrative Law Judge Edward J. Kuhlmann (ALJ). It has also before it the exceptions to that *I.D.* filed by Naleszkiewicz and the reply pleadings of the other parties to this hearing, Thomas Domencich and the Committee for a Fair Lottery (collectively CFL), Pacific Nationwide Cellular, and the Commission's own Common Carrier Bureau. Oral Argument was held on February 26, 1993.

BACKGROUND

2. *Hearing Designation.* This case was set for evidentiary hearing by *Hearing Designation Order*, 5 FCC Rcd 7131 (1990)(*HDO*), to determine whether Naleszkiewicz[1] is qualified to be a licensee or whether she has made material misrepresentations to the Commission, or lacked candor, in connection with the activities of Genesis Enterprises Ltd., of which Naleszkiewicz was (at most times pertinent herein)[2] Vice-President, Treasurer and a 25% principal of Genesis. Her husband, Wladimir, owned the remaining 75% and was the company's only other officer. As the ALJ wrote:

> Genesis describes itself as a business and engineering consulting firm with its primary service being the preparation of cellular non-wireline RSA [Rural Service Area] applications.

I.D. at para. 3.[3]

3. As described more fully in the *HDO*, an indictment was filed on December 5, 1989 against Genesis for many counts of federal mail fraud (18 U.S.C. § 1341); the indictment also charged Wladimir Naleszkiewicz with making false statements to Postal Inspectors (18 U.S.C. § 1001). 5 FCC Rcd at 7132. More specifically (*id.*):

> The indictment states that on or about January 5, 1989, Genesis and Wladimir Naleszkiewicz, knowing that they lacked the $139,000 required for the [FCC application] filing fees, failed to send approximately 697 applications on behalf 39 clients to the Commission during the three day filing window that ended on January 6, 1989.

And (*id.*):

> The indictment states that Genesis and Wladimir Naleszkiewicz continued their scheme to defraud when they failed to file approximately 741 applications on behalf of 40 clients on or about January 12, 1989, because they were lacking the required $148,200 for filing fees. The indictment states that Waldimir Naleszkiewicz sent so called "lulling letters" which were signed by Wladimir Naleszkiewicz and falsely assured clients that their applications had been filed and that the filing fees had been paid. The first ten counts of the indictment are based on the mailing of the "lulling letters" to each of ten clients in violation of Title 18, United States Code, Section 1341. Wladimir Naleszkiewicz was also indicted for making false statements to the United States Postal Inspection Service. Specifically, the indictment indicates that Wladimir Naleszkiewicz stated to the Postal Service that Genesis had filed all the applications at the Commission via Federal Express, that Genesis never verified that any checks drawn against the escrow accounts had actually been cashed by the Commission, and that Genesis had $100,000 remaining in its disbursement accounts after the filing periods for all RSA markets had ended. These false statements were alleged to be in violation of Title 18, United States Code, Section 1001.

[1] Unless otherwise indicated, the name "Naleszkiewicz" used *simpliciter* in this decision shall mean the applicant, Nancy Naleszkiewicz.

[2] Naleszkiewicz is now the president and sole proprietor of Genesis, for reasons that will be further explained in the text.

[3] In the pejorative, such firms were known in the cellular lottery trade as "application mills."

4. However[4]:

> On February 8, 1990, Wladimir Naleszkiewicz, Genesis and Nancy Naleszkiewicz entered into a plea agreement which was reported to the Commission by Nancy Naleszkiewicz in a Section 1.65 Amendment and Petition for Waiver filed March 1, 1990. Pursuant to the agreement, Wladimir Naleszkiewicz pleaded guilty to two counts of mail fraud (18 USC § 1341). Also under the plea agreement Wladimir Naleszkiewicz, Nancy Naleszkiewicz and Genesis entered into an arrangement to make restitution to the Genesis clients whose applications had not been filed. The cornerstone of the restitution plan is Nancy Naleszkiewicz's agreement to assign the Kansas 3 construction permit to a trustee who will sell the permit and use the funds received from the sale to recompense the injured parties. The first $287,600 will reimburse the victims for their lost filing fees. The next $287,600 will be distributed to the injured Genesis clients to compensate them for services not performed by Wladimir Naleszkiewicz when he failed to file the applications. The balance of the funds will be divided between the applicant and the victims by following a formula discussed below in the section that addresses the applicant's waiver request. If Nancy Naleszkiewicz does not receive a construction permit, she has agreed to be held jointly and severally liable (with Genesis and Wladimir Naleszkiewicz) to make restitution of $287,600 to the victims of the scheme.

Nonetheless, Naleszkiewicz has denied before this Commission any knowledge of, or complicity in, the illicit activities of Genesis and its failure to file on behalf of its clientele 1,438 applications with the FCC for inclusion in various cellular radiotelephone lotteries. *See* 5 FCC Rcd at 7133. Because substantial and material questions of fact obtained to Naleszkiewicz' categorical denial of the felonious activities of Genesis (and/or her husband), this instant application was set for hearing because, as fate would have it, Naleszkiewicz' own *personal* application won the FCC cellular radiotelephone lottery for the above-captioned Rural Service Area. The issues designated by the Commission were as follows:

> 1. To determine all facts and circumstances surrounding the failure of Genesis to file its clients' RSA applications for the filing windows beginning on January 4, 1989, and January 11, 1989;
>
> 2. To determine all the facts and circumstances surrounding the filing by Genesis of the inclusion requests;
>
> 3. To determine from the evidence adduced above, the extent, if any, of Nancy Naleszkiewicz' involvement in these events;
>
> 4. To determine, based on the evidence adduced under issues 1 through 3, whether Nancy Naleszkiewicz made or was involved in the making of material misrepresentations to the Commission or demonstrated a lack of candor.

5. *Dismissal of Application.* For reasons more fully explicated in his *Memorandum Opinion and Order*, FCC 91M-1790, released June 4, 1991, the ALJ dismissed Naleszkiewicz' application upon his perception that, despite earlier pleas of ignorance of the Commission's rules requiring the formal filing of a notice of appearance for the evidentiary hearing, Naleszkiewicz was, in fact, fully cognizant of that requirement but had earlier misled the ALJ into commencing the hearing anyway by her prior pleas of ignorance of the rules. Upon appeal of that dismissal to this Board, and for the reasons stated therein, we found that the ALJ had not abused the "very broad discretion" vested in him by the Commission, and we declined to overturn the ALJ.[5] But, on application for review to the full Commission, it determined that Naleszkiewicz had been afforded insufficient opportunity to defend her alleged ignorance. It therefore reinstated Naleszkiewicz, but left it "to the ALJ in the first instance to decide whether there is sufficient reason to add a misrepresentation issue against the applicant" based on her late appearance notice.[6] Upon receiving that remand from the Commission, the ALJ added the following new issues:

> 5. (a) To determine the facts and circumstances surrounding the submission and prosecution by Nancy Naleszkiewicz of the "Motion to Enter Appearance Late, Request to Appear at the Hearing and to Present Evidence on Behalf of Nancy Naleszkiewicz," filed January 30, 1991;
>
> (b) To determine in light of the evidence adduced pursuant to the foregoing issue,whether Nancy Naleszkiewicz misrepresented facts to the Commission, or exhibited a lack of candor, and, if so, whethershe should be disqualified; and
>
> 6. To determine, based on the evidence adduced pursuant to all the above, whether Nancy Naleszkiewicz possesses the requisite qualifications to be a Commission licensee and whether a grant of her application would be in the public interest.

6. *Disqualification Request.* Directly upon the ALJ's addition of those new issues, and pursuant to 47 CFR § 1.245, Naleszkiewicz petitioned the ALJ to disqualify himself from this proceeding, a petition the ALJ denied for the reasons set forth in his *Memorandum Opinion and Order*, FCC 92M-438, released April 10, 1992. Naleszkiewicz appealed that denial to this Board which, after consulting the lead-

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[4] *HDO*, 5 FCC Rcd at 7133. Moreover (*id.*):

> The plea agreement further provides that the United States Attorney will move for dismissal of the charges against Genesis and will not bring criminal charges against Nancy Naleszkiewicz for any involvement she may have had with the criminal product. The plea agreement specifically states that it does not constitute an admission by Nancy Naleszkiewicz of any knowledge of or complicity in the crimes committed by her husband.

[5] *Nancy Naleszkiewicz*, 6 FCC Rcd 4829 (Rev. Bd. 1991).

[6] *Nancy Naleszkiewicz*, 7 FCC Rcd 1797, 1798 (1992)(remanding proceeding to ALJ).

ing cases on this question, *e.g., Withrow v. Larkin,* 421 U.S. 35 (1975); *FTC v. Cement Institute,* 333 U.S. 683 (1948), *NLRB v. Donnelly Garment Co.,* 330 U.S. 219 (1947), found no persuasive authority or ample grounds to disqualify the ALJ at that particular stage. We stated[7]:

> Neither appellant nor the Board has any compelling reason at this point to believe that the ALJ will not afford appellant a generous opportunity to place upon the record all relevant and favorable evidence, or that he is incapable of rendering a dispassionate judgment on the subject issue(s).

Naleszkiewicz immediately appealed the Board's ruling on the ALJ disqualification petition to the full Commission which, after contemplating the matter, denied review of the Board's order.[8]

INITIAL DECISION

7. The *I.D.*, which runs 150 paragraphs, chronicles the operations of Genesis from its inception in January 1986, its internal operations in the marketing of FCC cellular applications and its "meticulous" accounting procedures. The *I.D.* then moves through to Genesis' financial problems in the late 1988/early 1989 period, and its federal indictment on December 5, 1989, down to the troublesome events that occurred even thereafter. Notwithstanding the ALJ's thoroughgoing recital of the ambient facts, Naleszkiewicz continues to claim that she was at all relevant times entirely ignorant of anything seriously improper at Genesis until her husband informed her on February 7, 1990 -- one day prior to his pleading guilty to federal mail fraud charges -- that Genesis had not filed more than 1400 FCC cellular applications on behalf of Genesis clients. Naleszkiewicz also maintained at hearing that it was not until nearly *one year* after *that* interspousal revelation -- during a deposition session for this 1991 FCC licensing hearing -- that her husband *first* told her that he had thrown nearly 700 FCC applications into the dumpster behind the Genesis offices, because there was no money for the $200 filing fee due with each application.[9] Finally, Naleszkiewicz continued to assert that, despite express written notice from counsel, she was completely unaware of the time deadline for filing a notice of appearance in response to the Commission's November 1990 *HDO*.

8. Because Naleszkiewicz does not challenge in the slightest the ALJ's findings of fact,[10] we incorporate these wholesale by reference. Without a recrudescence of all of the minute detail of the *I.D.*, we shall summarize the key facets of the record. Neither Mr. or Ms. Naleszkiewicz were novices in the cellular industry, Ms. Naleszkiewicz' own experience having begun in 1983. *I.D.*, para. 4. After Genesis was formed in 1986, it became "successful" in "marketing its services and contracting with clients to prepare and file applications for RSA licenses." *Id.*, at para. 6. Although at hearing Naleszkiewicz described herself as Vice President of Genesis in "title only," the record discloses that she was a full partner of her husband in many vital aspects of the business, and in fact ran the business entirely by herself for a number of months in 1987 when her husband was sidelined by heart bypass surgery. *See id.*, paras. 11-12.[11]

9. After describing the sales and consulting activities of Genesis, the ALJ set the pertinent backdrop for this administrative tableau:

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[7] *Nancy Naleszkiewicz,* 7 FCC Rcd 3098, 3099 (Rev. Bd. 1992). In fact, at oral argument we queried Naleszkiewicz' counsel about the nature of the evidentiary hearing. Counsel indicated that the hearing consumed five days and he responded as follows to these Board questions:

> [Board Member]: Were there any witnesses you wished to present but were not permitted to?
>
> [Counsel]: Not to my knowledge.
>
> [Board Member]: Were there any exhibits that you proffered that were rejected?
>
> [Counsel]: Not to my knowledge.
>
> [Board Member]: Thank you.

Tr. Oral Arg. at 1207. *See also id.*, at 1283 (counsel expresses belief at closing that oral argument afforded "a very careful hearing" of salient issues).

[8] *Nancy Naleszkiewicz,* 7 FCC Rcd 4179 (1992)("We agree with the Board's resolution of this matter."). Despite the Commission's prior resolution of this matter, in both her exceptions and in a letter pleading of February 10, 1993, Naleszkiewicz yet grieves the qualifications of the ALJ to try this case. (CFL has motioned to strike the February 10 letter.) Because this matter has been decided by the Commission, and inasmuch as Naleszkiewicz has certainly preserved its argument for purposes of any appeal, we shall address this disqualification matter no further.

[9] *See* Tr. of Oral Arg. at 1267.

[10] Indeed, the Board noted at oral argument that nowhere in Naleszkiewicz' 22 pages of exceptions is there to be found a cite to the hearing record (*e.g.*, witnesses testimony transcript, hearing exhibit, *etc .),* and it questioned counsel about the lack of specific record support for the contrary assertions contained therein. *See* Tr. of Oral Arg. at 1215-1216. Counsel responded that, in challenging the ALJ's basic conclusions of untruthfulness, he "took the findings of Judge Kuhlmann in the least favorable light to Mrs. Naleszkiewicz." *Id.*, at 1216. Counsel then declared (*id.):*

> I don't think that Judge Kuhlmann misstated the record. I think the record doesn't support his findings.

(With due respect to counsel, who has not before appeared at an FCC hearing, we believe counsel meant to contend that the record does not support the ALJ's "conclusions of law," since the "findings of fact" are not disturbed by his exceptions.)

[11] In fact, Genesis' marketing brochure stated:

> Ms. Naleszkiewicz is an experienced Office Administrator with a background in marketing, management, communications and also liaison work with Federal and State agencies. Her telecommunications experience over 10 years includes positions with [C&P] and [Satellite Systems Engineering] Committee Exh. 2 at 2; Tr. 166.

I.D. at para. 15. Satellite Systems Engineering also prepared FCC cellular applications, *see id.*, para. 4.

> The first RSA [cellular application] filings were in July 1988. Between July 1988 and January 1989 the Commission accepted applications for 478 RSA markets during 22 separate filing windows. *See* Committee Exh. 12. The 22 filing windows were divided into five "Blocks." *See id.*; Tr. 198. Ms. Naleszkiewicz knew that each client for whom Genesis prepared RSA applications executed a Services Agreement with Genesis and paid Genesis a fee, which "varied depending on the number of applications filed, the date they were ordered, and other commercial circumstances." CCB Exh. 12 at 2.

I.D. at para. 16. It further develops that, although Naleszkiewicz has maintained throughout that her husband was the sole individual familiar with the company's finances, the evidence strongly contradicts that assertion. First, she and her husband were both (and the only ones) authorized to sign Genesis checks, and Genesis kept two principal bank accounts: one account was a general operating account; and the second -- the "escrow account" -- was for money received from clients to be used for the filing fees required by the FCC for each application. *See id.*, paras. 17-19. Second, the *I.D.* continues (*id.*, at para. 20; emphasis added):

> *Genesis memoranda indicate Ms. Naleszkiewicz received the original and a copy of each check received from a client; a copy of each application; a copy of each Disclosure Statement; a copy of each signature page; a copy of each Services Agreement; and a copy of each Addendum.* Committee Exh. 4 at 1, 2; *see* Tr. 184,185, 187. Mr. or Mrs. Naleszkiewicz also received the original check. Committee Exh. 4 at 2. Ms. Naleszkiewicz admitted she kept client files and received these documents. Tr. 185-86. Genesis employee Nancy Wardinski (Wardinski) confirmed that throughout Genesis' entire RSA filing program "[e]verything that we did practically [Ms. Naleszkiewicz] received a copy of, but how many things she actually reviewed and so on, I don't know." Tr. 664; Tr. 684. Ms. Naleszkiewicz testified she eventually "put a stop" to receiving the materials, Tr. 186, but did not remember when this was and did not send a memorandum to this effect. Tr. 188. She testified she threw away most of the materials, but did not remember when this occurred. Tr. 186.

Third, and according to the Common Carrier Bureau (Reply Br. at 9), "Mrs. Naleszkiewicz also transferred funds from the escrow account to the escrow disbursement account in an amount sufficient to assure that FCC fee checks would clear the bank. (Naleszkiewicz Ex. VN at 9...)."

10. Next, and according to its own internal accountant, Lee Curtis, Genesis produced monthly accounting statements reflecting, *inter alia*, all of the bank balances, *id.*, para. 21; and, according to her own husband, Naleszkiewicz received a copy of those monthly financial statements. *Id.* Not only that (*id.*, at para. 27; emphasis added):

> *Ms. Naleszkiewicz signed "virtually all" of the filing fee checks that were attached to each application filed* (Naleszkiewicz Exh. NN at 3) and she testified that although her spouse "may have signed them at first," *she thereafter signed them all.* Tr. 223 *She knew each filing fee check was drawn on the disbursement account and she never signed a check drawn on that account that was not for filing fees.* Tr. 223. She stated she never asked "whether there were sufficient funds in the account to pay" the checks written on the disbursement account. Naleszkiewicz Exh. NN at 3. However, she "always asked" her husband if there were enough money when she wrote checks for bills and payroll. Tr. 616.

11. Irrespective of the fact that Naleszkiewicz received copies of Genesis' monthly financial statements and was responsible for drawing all FCC fee checks, she here swears that she was utterly unaware that Genesis lacked the money to make the FCC application filings of January 1989, despite the following:

> The bank statement for Genesis' escrow disbursement account for December 1988 shows 591 items returned checks, for $200 each, for a total of $118,200. Committee Exh. 16 at 2-14. The date indicated for each transaction was either December 20 or 23, 1988. Mr. Naleszkiewicz testified the reason there were insufficient funds in the disbursement account was that he did not get the loan check from The Money Store in time to deposit it into the escrow disbursement account. Tr. 927-28. The bank had notified Genesis that the disbursement account had insufficient funds. Tr. 927. Ms. Naleszkiewicz was aware that the bank had called, and said she and her spouse were in West Virginia when the "bank called Nancy Wardinski and she tracked down Wlad." Tr. 233, although she testified that she did not "remember when that was. I don't remember much about the last of 1988." Tr. 233.

I.D. at para. 43. Moreover, Mr. Naleszkiewicz testified that he told his wife in December 1988 that they required a $150,000 loan from The Money Store because Genesis "didn't have enough cash" to cover the FCC filing fees for their clients. *Id.*, at para. 44 (citing Tr. 251-53; 1170-71).[12] Indeed, notwithstanding her solemn avowal that she did *not*

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[12] However, the ALJ had earlier noted:

> While Ms. Naleszkiewicz was Vice President she and her spouse were both well compensated. Committee Exh. 35 at 20 reflects that Mr. and Ms. Naleszkiewicz' salaries for 1986 were $118,400 and $67,650, respectively; for 1987, $96,100 and $46,900, respectively, for 1988, the date on which the exhibit was prepared, $31,200 plus bonuses, and $20,800, respectively. The 1988 salary figures in this exhibit are corroborated by the only W-2 forms introduced into evidence by the Naleszkiewiczes. Naleszkiewicz Exhs. NN-11 and VN-3. The Naleszkiewiczes also enjoyed a comfortable lifestyle, making a $290,000 cash downpayment on a home in June 1988 and purchasing Jaguar and BMW automobiles, Committee Exh. 13 at 6, 7; Tr. 232. Mr. Naleszkiewicz stated "we travel a lot," and

know that The Money Store proceeds would be used to cover FCC filing fees for her clients, *I.D.*, para. 45, she had accompanied her spouse to the loan office and co-endorsed The Money Store check as follows: *"Pay to the order of The Genesis Enterprises Ltd. Escrow Disbursement Act."* *I.D.* at para. 46 (emphasis added).[13] Nevertheless (*id.*, at para. 49):

> The accountant's monthly compilation report for December 1988 shows that, despite concerns about having money for filing fees, there were no decreases in salaries; in that month Genesis paid officer's salaries of $9,257.50 for Genesis and $10,687.50 for Genesis Southwest. Committee Exh. 25 at 1; Tr. 809-10.

12. Despite the infusion of the proceeds of The Money Store loan in late December 1988 into the "escrow account," $118,200 of which was presumably used to cover the 591 checks ($200 each) dishonored by the bank earlier that month, Genesis was without an adequate balance to cover the FCC filing fees for the *next* 719 cellular applications due to filed on January 5, 1989; nor for the *next* 719 due to be filed on January 12.[14] And although Genesis applications previously had been driven personally to the FCC depository, an unexplained decision was (putatively) made to utilize Federal Express for purposes of "filing" this particular January 1989 batch. *I.D.* paras. 50-60. Notwithstanding her acute awareness of the prior month's 591 bounced checks, and the depletion of the Genesis "escrow" account, Naleszkiewicz claims that she assisted as usual in the packaging of the many hundreds of cellular applications due to be filed in early January 1989, signed each FCC filing check, but never *once* asked her husband if Genesis had sufficient funds ($287,600 in all between January 5-12) to cover these many hundreds of $200 filing fee checks. Furthermore, while Naleszkiewicz admittedly helped *remove* the "transmittal sheets" that ordinarily accompanied each FCC application as proof of filing with this agency, she nonetheless contends that in her concurrent discussions with her husband "they did *not* talk about getting proof of filing to replace the transmittal sheets" they had purposely removed. *I.D.* at para. 57 (emphasis added).

13. Nor, swears Naleszkiewicz, did she become aware of anything fatally amiss shortly thereafter in March 1989 when she was advised by Genesis' General Counsel, Sheldon Schuman, that a client, Cell-Call (*see supra* note 14), had phoned him requesting proof that all of *its* FCC applications had been filed. *I.D.*, para. 68.[15] Although Naleszkiewicz did provide, from Genesis' bank records, copies of the Cell-Call checks for the January 5, 1989 FCC filings, and did so by examining the cancelled bank checks from the early January 1989 filing period, she took no notice whatever -- we are to believe -- that her files did not contain cancelled checks for 1,438 *other* applications supposedly filed during that same January period.

14. Nor, again swears Naleszkiewicz, was she alerted to the situation when approached in October 1989 by one of Genesis' (former) salesmen, Al Waddill, and informed by him that the official FCC Lottery Notice (released October 6, 1989), which listed all of the applicants that had filed during the early January 1989 "filing windows," did not include the names of Waddill's Genesis accounts. *I.D.*, paras. 66-71. Naleszkiewicz testified here that, in response to Waddill's request to produce the cancelled January 1989 checks for his particular accounts, she "looked in a couple of places where I thought they might have been, and they weren't." *Id.*, at para. 67 (quoting Tr. 387), though Naleskiewicz was aware that this was not the first occasion when Waddill's Genesis accounts failed to be listed on FCC Lottery Notices. *See id.* Moreover, Waddill was not the only one that discovered the absence of Genesis clients on the official FCC Notice of January 1989 filings:

> Others also knew there were problems, including Genesis' general counsel Sheldon Schuman, Nancy Wardinski, and Genesis' marketing director. Wardinski said she "first found out that ... some of Genesis' clients may not have been filed when Bob Grand called.... I don't believe the lottery list was out yet, and he mentioned that there would be a problem." Tr. 649. Bob Grand was Genesis' director of marketing. Tr. 649. Wardinski believes the call, which she received at Genesis, occurred before the first lottery list came out in October 1989. Tr. 650. She does not know if Grand spoke with Mr. or Ms. Naleskiewicz. Tr. 651-52. Schuman first learned there was a problem with the January 1989 filings when he received a telephone call from Robert Burka, who said "there appears to be a problem with ... certain people who were not included in the lottery, and one of them being Waddill's group, and I don't know the circumstances, but maybe you could talk to Wlad...." Tr. 867. Burka was Waddill's counsel. Tr. 902.

I.D., at para. 69. In spite thereof, and Sheldon Schuman's own testimony that he "was advised" by "somebody at Genesis" that a significant number of its January 1989 applications were not included on the October 1989 Lottery Notices issued by the FCC, *id.*, para. 70, Naleszkiewicz here contended that "she did not remember looking at the [FCC] lottery lists after they were released...." *Id.*, at para. 72 (citing Tr. 5430). However, Genesis employee Nancy

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remembered "several business trips" in 1988. Tr. 1052. Ms. Naleszkiewicz confirmed trips to France in 1988 and to Portugal, Bermuda and Denmark in 1989. Tr. 445, 447.

I.D. at para. 32. Moreover, while Naleszkiewicz claimed she was preoccupied with the medical problems of her niece in late 1988, she and her husband travelled to Cannes, France in October of that year. *Id.*, para. 39. The record does not reveal whether these expenditures caused, or contributed to, the financial problems that shortly befell Genesis.

[13] The Naleszkiewiczes apparently advised The Money Store that the loan was needed for general operating expenses (*e.g.*, salaries). *I.D.*, para. 47.

[14] Genesis did timely file 22 FCC applications, apparently all on behalf of a client known as Cell-Call, *see I.D.*, paras. 66-72, about which more *infra* in our text. Suffice it that Naleszkiewicz testified that in "packaging" the January 5, 1989 batch of 719 applications, the Cell-Call applications were purposely "left aside" from the bulk of the batch. *See id.*, para. 55.

[15] Genesis had failed to file a number of Cell-Call applications in 1987. Naleszkiewicz herself negotiated a settlement agreement with Cell-Call to make good for that lapse in future filings, at Genesis' sole expense. *I.D.*, para. 135. *See also id.*, para. 14.

Wardinski, its Administrative Assistant since 1986, *had* reviewed the October 1989 Lottery Notices "to determine which Genesis applications were on each list. *Most of the Genesis applications were not on the [FCC] lists....*" *Id.* (quoting Naleszkiewicz Exh. NW at 3; emphasis added).

15. On October 23, 1989, armed with a Criminal Complaint and a Search Warrant, U.S. Postal Inspectors arrived at the Genesis offices and conducted their investigation. *I.D.*, paras. 72-75. Naleszkiewicz submits that was the first occasion when it was intimated to her that Genesis applications had not been filed, *id.*, para. 74, but was of the "belief," she says, that the Criminal Complaint was merely an attempt by Waddill to put Genesis out of business. *Id.*, para. 77. As the ALJ records (*id*):

> Despite the fact she and her spouse later signed a Plea Agreement admitting what had [actually] happened, she testified, "I still believe it." Tr. 424.

Even after reviewing the Criminal Complaint and attendant affidavit, Naleszkiewicz swore here that "she did *not* ask if any of the information in it was true." *Id.* (citing Tr. 414; emphasis added).

16. After consulting with a practicing communications attorney, William Fishman, who was himself skeptical of their story, *I.D.*, para. 79 (citing Tr. 84-85; Fishman testimony), Fishman and the Naleszkiewiczes nevertheless reviewed some company documentation; but (*id.*, at para. 80):

> Ms. Naleszkiewicz knew Fishman asked her spouse whether they had looked at canceled checks or bank statements. Tr. 525-26. According to Ms. Naleszkiewicz, her spouse answered "no, he had sat down and went through all the checks to try to find those particular checks." Tr. 526.

Naturally, he did not find them.

17. Notwithstanding all of the foregoing, and the impending criminal trial against it, Genesis brazenly filed in November 1989 "Petitions for Inclusion" of the (phantom) cellular applications in the forthcoming FCC lotteries, there averring to this agency that the missing 1438 applications *were* timely filed and that the FCC was at fault for their omission from the Lottery Notices.[16] While Naleszkiewicz, at first, claimed that she "did not participate" in drafting the false "inclusion" petitions "nor did I concern myself with their contents because I didn't believe they pertained to me...." *I.D.*, at para. 82, it develops that (*id.*, at para. 83; emphasis added):

> in a statement prepared in this proceeding as an attachment to her reply to [an opponent's] opposition to her Section 1.65 amendment and Petition for Waiver, Ms. Naleszkiewicz stated "I did review the final text [of the petitions] only to assure that they were consistent with the facts known to me. I determined that they were." CCB Exh. 12 at 2. At the hearing, Ms. Naleszkiewicz testified "when this was typed up. I didn't explain it right." Tr. 581. She "believe[s]" she wrote the statement. Tr. 582. She testified "[w]hat I reviewed was the final to make sure that ... everything that went with it was complete. I mean all of the attachments...." Tr. 582. She did not "remember sitting down and reading" the petition. Tr. 583. She testified she helped assemble "the attachments that went along with what he was filing..." and thinks she helped Wardinski "with the list for inclusion because it had to be our clients minus the ones that ... were filed." Tr. 529. *Wardinski confirmed that Ms. Naleszkiewicz assisted her in confirming which applications were not filed.* Naleszkiewicz Exh. NW at 4; Tr. 669-70.

As will be seen very shortly, Naleszkiewicz' contention(s) with respect to her state of knowledge *at the time* of these November 1989 "inclusion" petitions would ricochet to her great disadvantage.

18. Only two months thereafter, and as indicated at the outset, both Naleszkiewicz and her husband signed a Plea Agreement of February 8, 1990 with the local U.S. Attorney that provided, *inter alia*, (1) that "if a reasonable restitution plan" could be worked out to recompense Genesis' clients and Mr. Naleszkiewicz pled guilty to two counts of mail fraud, he would receive a lenient sentence[17]; and (2):

> The Agreement ... states "the United States Attorney's Office agrees not to bring criminal charges against NANCY NALESZKIEWICZ for any involvement that she may have had with the crimes outlined in the Statement of Facts...." in return for the fulfillment by Ms. Naleszkiewicz of all of her obligations under the Agreement. Naleszkiewicz Exh. NN-1(a) at 19.

See I.D., at paras. 87-95. Appending that Plea Agreement was a comprehensive Statement of Facts, reviewed and signed by Naleszkiewicz after consultation with counsel, which Statement set out very specifically the illicit actions of Genesis with respect to the entire fraud, including the dispatch of "lulling letters" to Genesis clients falsely assuring them that all was copesectic with their respective FCC applications. *See id.*, paras. 90-92.[18] In signing the Plea

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[16] *See* Tr. of Oral Arg. at 1265-1266, where Bureau counsel describes the work that was necessary to (1) scour FCC files and (2) "write a number of opinions... that indicated that the applications had never been filed. They [Genesis] never came forward and told us the truth."

[17] *See I.D.*, para. 88.

[18] As reported in the *I.D.* at para. 90 (emphasis added), Naleszkiewicz counsel Sheldon Schuman testified at this hearing to the following effect:

> Schuman testified he was present and Ms. Naleszkiewicz was not surprised by the plea "because she knew he was going to plead guilty. It was presented to us by the U.S. Attorney that the evidence was so overwhelming that they ... felt that a defense in his case ... could not be successful...." Tr. 916-17. He testified he first found out that day that Mr. Naleszkiewicz had not filed the applications, Tr. 897, and found out "three to four weeks" before Mr. Naleszkiewicz' deposition in this proceeding that the applications were thrown in the dumpster. Tr. 897-98;

Agreement, Naleszkiewicz herself "*agree[d] that the facts set out in the statement of facts are accurate in every respect.*" *Id.*, at para. 92 (citation omitted; emphasis added). Still, swore Naleszkiewicz at this very hearing, she believed at the time of the Plea Agreement that Genesis *had* filed the subject applications, that her husband pled guilty only to avoid the maximum sentence, and that she herself did not entertain any doubts that the January 1989 applications *had* been properly filed with the FCC until some (unspecified) time *after* her husband's sentencing. *Id.*, para. 92.

19. Be that as it may, and despite FCC rules to the contrary,[19] the Plea Agreement calls for Naleszkiewicz to use all of her present and future assets -- including this cellular permit, if she receives a grant -- to compensate the "victims" of Genesis' misdeeds. *I.D.*, para. 94.[20] Following the signing of the Plea Agreement, Naleszkiewicz became President of Genesis, and her husband became a "consultant" to the firm. *See I.D.*, paras. 3, 7-9. Thereafter, it is said, Naleszkiewicz has made all of the decisions for Genesis. *See id.*

20. But it was briefly after that, according to the Common Carrier Bureau,[21] that an event occurred that is nothing less than a smoking pistol pointed at Naleszkiewicz' honesty. Although, after the Plea Agreement was executed, Genesis decided (for obvious reasons) not to pursue the "Petitions for Inclusion" filed in November 1989 averring that the 1438 cellular applications *had* been duly filed with the FCC, *see I.D.*, para. 95, Genesis did file in February 1990 the Plea Agreement and an attendant petition for waiver of 47 CFR § 22.922 (*see supra* note 18) to allow her to immediately sell the construction permit pursuant to the Plea Agreement. *See HDO*, 5 FCC Rcd at 7135-36. Other competing lottery applicants, including CFL, filed formal oppositions with the FCC to Naleskiewicz' application and her concomitant waiver requests. *Id.* However, in a separate statement attached to a Genesis reply to those opposition pleadings, Naleszkiewicz averred that she had reviewed the November 1989 "Petitions for Inclusion" and, "consistent with the facts known to me," all of the representations and protestations of Genesis' innocence contained in those earlier-filed "inclusion" petitions remained *true* and *accurate*.[22] Bear in mind, however, that Naleszkiewicz filed this latter statement (1) only *weeks* after she had signed the Plea Agreement and the Statement of Facts in which *all* of the incriminating details of the crimes had been thoroughly ventilated; and (2) she has sworn in her direct case filed in this proceeding that she had *not* participated in the drafting of the "inclusion" petitions, because she didn't "believe they pertained to me." *See supra* para. 17. At hearing, Naleszkiewicz' multifarious explanations for these blatant contradictions were *themselves* blatantly contradictory. *See I.D.*, paras. 82-83, 142-143.

21. Finally, pursuant to Issues 5 and 6 added by the ALJ upon Commission remand, *see supra* para. 5, the *I.D.* found that William Fishman, a practicing communications attorney who had represented Genesis (and/or the Naleszkiewiczes) for more than six years, sent a copy of the Commission's November 1990 *HDO* to Naleszkiewicz, and sent a copy as well to Sheldon Schuman, Genesis' General Counsel. *See I.D.*, paras. 96-102. On December 7, 1990, Fishman sent a special letter (copy to Schuman) to Naleszkiewicz explaining that "[he] could no longer advocate Mrs. Naleszkiewicz' position that she knew nothing about and had not participated in any improper or unlawful conduct ...." *Id.*, at para. 104. Therein Fishman withdrew as counsel, and (*id.*, at para. 105; emphasis added):

> The December 7 [Fishman] letter advised Ms. Naleszkiewicz "*[y]our counsel should file a Notice of Appearance at the FCC as provided in Par. 62 of the ... Designation Order.*" Naleszkiewicz Exh. WF-1 at 1. Ms. Naleszkiewicz testified she "did not pay attention at all" to this language. Tr. 481.

The referenced paragraph 62 of the Commission's November 26, 1990 *HDO*, in turn, expressly required Naleszkiewicz to file a "written notice[] of appearance under Section 1.221 of the Commission's rules within 20 days of the mailing of this order" by the Secretary of the FCC. *See HDO*, 5 FCC Rcd at 7138.[23] Naleszkiewicz admits to timely reception of the Fishman letter and the *HDO*, but claims

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873-74. *"[T]o the best of [Schuman's] recollection" Ms. Naleszkiewicz was present when he found this out.* Tr. 882; 976.

(It will be recalled, however, *see supra* para. 7, that Naleszkiewicz testified here that she did not learn of the "dumpster disposal" until a *later* deposition session with her husband, according to Bureau counsel.)

[19] Under 47 CFR § 22.922, the permittee of a cellular radiotelephone is prohibited absolutely from selling or "by any form of alienation" disposing of the bare permit. (This rule provision, thought the FCC in some serious naivete, would help preclude "speculation" in the FCC cellular lottery regime.) The FCC's Common Carrier Bureau at one time "approved the concept of the [Naleszkiewicz] plea agreement" allowing Naleszkiewicz to sell the permit, Reply Br. at 3, but it now supports affirmation of the *I.D.*

[20] It will be recalled from the *HDO* language recited in para. 4 of our text that the Plea Agreement provides that, should Naleszkiewicz be found qualified for this cellular construction permit and -- despite FCC rules, *see supra* note 19 -- allowed to sell the permit immediately to a third party, the first $575,200 shall be given over to Genesis' "victims," with the "balance" to be distributed according to a (later) specified formula. At oral argument, Naleszkiewicz counsel suggested that the instant permit "is worth maybe a million dollars," Tr. of Oral Arg. at 1234; and the Common Carrier Bureau states that Naleszkiewicz "would realize from 10 to 15% of the proceeds" under the formula spelled out in the Plea Agreement. Reply Br. at 3. However, the *HDO* stated that the Plea Agreement stipulates that this permit has a transfer value of between $2 and $5 million dollars. 5 FCC Rcd at 7135. (It is also recalled that, under the Plea Agreement and should the deal go down, Naleszkiewicz and her husband would be relieved of their current joint and several liability to the "victims." *See supra* para. 4.)

[21] *See* Reply Br. at 12-13; *see also* Tr. of Oral Arg. at 1274-1275.

[22] *See id.; see also I.D.*, paras. 82-83, 142; CFL Reply at 18.

[23] Fishman's Letter of December 7, 1990 to Naleszkiewicz also provided her with a specimen "notice of appearance." *See Nancy Naleszkiewicz, supra* note 4, 6 FCC Rcd at 4830. Further, although Fishman's letter cited an (unspecified) "conflict" as the reason he could not represent Naleszkiewicz at this hearing, the letter also advised that he could be "available on a limited and background basis" to assist her with the hearing. But at the hearing itself, Fishman "was unable to recall," he says, why he believed there was a conflict that precluded his representation in December 1990. *See I.D.*, paras. 104, 106. (*But see infra* note 25) Just as curiously, perhaps, we note that -- for some period --

she did not "understand" it. *See I.D.* paras. 100-101. Schuman also received a copy of the Fishman letter and the *HDO;* and in an early December 1990 telephone discussion, Fishman advised Naleszkiewicz that Schuman was "the most likely person" to appear and represent her at the designated hearing. *Id.*, para. 106.

22. Naleszkiewicz did not file a timely notice of appearance pursuant to the *HDO*. However, on January 3, 1991 she wrote to Schuman reminding him of the forthcoming hearing before Judge Kuhlmann and requesting that Schuman represent her at that hearing. That January 3 letter to Schuman also (1) "enclos[ed] a copy of Part 1 of the FCC rules (including, of course, § 1.221 prescribing notices of appearance); and (2) expressly advised Schuman that "I need counsel to formally notify the Commission of his intention to appear on my behalf in the above [*HDO*] proceeding."[24] While Fishman testified that he certainly knew that a timely notice of appearance had to be filed with the FCC pursuant to the *HDO* and applicable FCC rules, *I.D.*, para. 110, and he discussed the *HDO* with both Schuman and Naleszkiewicz several times in early December 1989, *id.*, para. 109, Naleszkiewicz has for her part steadfastly averred that in her discussions with Schuman -- which began shortly after both received the December 7 Fishman letter -- the matter of the filing of a notice of appearance never arose. In any event, Naleszkiewicz did testify that "Schuman ... may have said I need money before I could represent you ...," *id.*, at para. 116 (quoting Tr. 564), but she "was having financial problems at the time and did not have available cash to retain an attorney." *Id.* (quoting Naleszkiewicz Exh. SS-4 at 3). As to Schuman:

> after he received her January 3, 1991 letter, he told her he could not represent her until he received a retainer. Naleszkiewicz Exh. SS at 2. Schuman testified he told her the proceeding could cost as much as $100,000 in legal fees. Tr. 824.

I.D. at para. 116.[25] Ultimately, by letter of January 24, 1991, Naleszkiewicz sent Schuman a $3,000 retainer check (post-dated to January 29).[26] On January 30, Schuman appeared at the prehearing conference with a "Motion to Enter Appearance Late," and he told the ALJ: "inadvertently I did not file a notice of appearance." *I.D.* at para. 122 (quoting Tr.3). Subsequently, when all of the foregoing correspondence came to the ALJ's attention following discovery (the ALJ had leniently relented and allowed Naleszkiewicz' late appearance), the ALJ summarily dismissed Naleszkiewicz' application for having failed to show good cause for her late appearance in the first instance, and he found her claims of ignorance of the rules not to be credible in the face of the new documentary materials. *See Memorandum Opinion and Order,* FCC 91M-1790, *supra* para. 5.

23. Upon the Commission's remand of that summary dismissal, *see supra* para. 5, the ALJ added the aforenoted "notice of appearance" issues, heard the full explanatory testimony of all of the relevant witnesses (including Fishman and Schuman), *see I.D.* paras. 96-124, but nevertheless concluded with respect to Naleszkiewicz that "all of [the] evidence ... belies her representations that she was 'unaware' of the need to file timely notice." *Id.*, at para. 146.

EXCEPTIONS

24. As we observed earlier, *see supra* para. 8 & note 10, Naleszkiewicz' exceptions do not at all contest the ALJ's lengthy findings of fact,[27] but argue instead that even if the findings of fact are viewed in a light "least favorably" to Naleszkiewicz, the facts do not support the adverse conclusions reached by the ALJ. Rather, as counsel would have it, the evidence shows Naleszkiewicz to be merely "a housewife" with "a limited amount of duties" at Genesis, who "relied on her husband" and had no slight inkling at any time of fraud or deceit occurring at Genesis with regard to the subject FCC applications.[28] Naleszkiewicz insists that she "was never criminally indicted as to any one of the offenses,"[29] and that the *I.D.* is the product of "a hostile and biased judge."[30]

DISCUSSION

25. Even if we ignore in their entirety the ALJ's demeanor findings, *see I.D.* paras. 148-150,[31] we have no difficulty at all in affirming the adverse conclusions of law under every issue canvassed by the *I.D.* In order for this Board to

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Schuman withdrew as counsel in this case, and was supplanted by Fishman. *See* Letter to Donna R. Searcy, filed June 19, 1992. Schuman, however, later resumed representation, while Fishman acted solely as a witness. This tag-team representation may have had some relation to Rule 3.7 of the Rules of Professional Conduct of the D.C. Bar, but we are left to speculate.

[24] *See id.*, 6 FCC Rcd at 4830. Additionally, under his law firm's letterhead, Schuman, in his role as Genesis' General Counsel, sent a letter of January 9, 1991 to Genesis' clients reassuring them of their prospects before the FCC. *Id.*

[25] At that time, Genesis was still in debt to Fishman's law firm (Sullivan & Worcester) for $24,057.18. *Id.*, 6 FCC Rcd at 4835 n.16.

[26] *See id.*

[27] Indeed, so barren are the exceptions that CFL contends (not without merit) that the exceptions themselves are manifestly susceptible to dismissal under the language of 47 CFR §1.277 for failure to "point out with particularity alleged material errors in the decision or ruling and shall contain specific references it the page or pages of the transcript or hearing, exhibits or order if any on which the exceptions is based." Nevertheless, considering the "unique" nature of this particular case *and* its past adjudicatory history, *see supra* paras. 2-6, we shall rule on the merits of the *I.D.*

[28] *See, e.g.*, Tr. of Oral Arg. at 1222.

[29] Exceptions at 11. (But Genesis Enterprise Ltd., of which she was Vice President and a 25% principal, was a named defendant. *See also supra* note 4; in exchange for husband's plea, Naleszkiewicz herself would not be charged.)

[30] Exceptions at 20.

[31] Ordinarily, an ALJ's demeanor findings are entitled to appreciable deference. *See, e.g., TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987) (and cases cited therein). However:

> Credibility involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.

Carbo v. U.S., 314 F.2d 718, 749 (9th Cir. 1963). Thus, for example, the Commission affirmed the disqualification of a common carrier applicant on grounds of misrepresentation and

find that Naleszkiewicz has been completely truthful and candid with this Commission, we would have to believe each and every one of the following propositions: (1) that despite the wealth of evidence that Naleszkiewicz, an experienced cellular application operative as well as a 25% owner and Vice President of Genesis (who ran the company herself during a critical 1987 period), was an active partner of her husband in many key aspects of the enterprise, we should credit her claim that she was but "a housewife" with "limited duties" who relied almost totally on her husband; (2) that despite the fact that she received copies of all monthly financial statements, and was responsible for writing all FCC fee checks, she "*never*" asked her husband whether there was adequate money in the designated "escrow account," though (contralogically) she "*always*" asked her husband if there were sufficient funds in the general operating account to cover routine expenses; (3) that whereas she was acutely conscious that 591 fee checks had been bounced in December 1988 (because the "escrow account" was deficient by at least $118,200), and she (along with her husband) purposefully endorsed the $150,000 Money Store check to the "escrow account" late that very month, she did *not* ask her husband just two weeks later whether the "escrow account" contained sufficient funds to cover the 1438 *additional* applications due to be filed in early January 1989; (4) that her husband never hinted to her that the subject applications were not filed with the FCC; (5) that in reviewing the check files in March 1989 for cancelled checks for a client known as Cell-Call (which insisted on proof of filing in view of past nonfeasance by Genesis), she took no contemporaneous notice of the fact that the files did not contain cancelled checks for the *other* 1438 applications that were (ostensibly) part of Genesis' January 1989 processing batch.

26. Naleszkiewicz requires us to find that the hearing evidence equally supports her claims (6) that even after it became public that the FCC's October 6, 1989 Lottery Notice contained the names of *none* of Genesis' (January 1989) client applications, and at the same time admits that she "may" have reviewed (with Wardinski) Genesis' computer list to see which of its clients was on the official FCC Lottery Notice,[32] she "really didn't give [a] thought" to the matter beyond confirming that the aforementioned (twenty-two) Cell-Call applications were properly listed;[33] (7) that even after the U.S. Postal authorities advised Naleszkiewicz of the contents of the Criminal Complaint on October 23, 1989, and a thorough search of the premises then (and later with her husband and counsel Fishman) failed to indicate the filing of the subject 1438 applications, Naleszkiewicz did *not* ask her husband if the Criminal Complaint was accurate in any respect; (8) that even *after* she had signed the Plea Agreement in February 1990, and with full knowledge and counsel had joined in the government's supporting Statement of Facts, she continued to believe that the January 1989 applications had been duly filed, that she "*still*" believed at this very hearing the criminal charges were some sort of unexplained "plot" of salesman Al Waddill,[34] and that she did not even learn the real truth of her husband's 1989 "dumping" of the applications until approximately one year *later* at a 1991 deposition session for this administrative licensing hearing"[35] ; and (9) that despite her direct hearing testimony that she had *not* reviewed the November 1989 "inclusion" petitions filed with the FCC, and notwithstanding her fully informed signing of the February 1990 Plea Agreement, she had earlier attested to a 1990 opposition pleading, therein declaring that she *had* reviewed those "inclusion" petitions and that Genesis' claims therein that the 1438 applications *had* been properly filed remained true and correct to the best of her knowledge.[36]

27. Comparing these *seriatim* claims to the record evidence, belief of even *one* of these discrete claims would compel from any reviewer an act of the willful myopia propounded here as the defensive thesis by Naleszkiewicz herself. But taken as an whole, the hearing evidence conclusively proves Naleszkiewicz' claims of blithe innocence in the illicit affairs of Genesis to be a pinacotheca of a paltering and outright prevarication. Even if viewed in a light "*most* favorable" to Naleszkiewicz, the demonstrative evidence and witness testimony support the conclusions of the *I.D.*, not by a simple preponderance, but to the degree of clear, convincing, nay irrefragable.[37]

CONCLUSION

28. Having extended to this record a *de novo* review, we now fully comprehend the substantive impotence of the Naleszkiewicz' exceptions. Or to frame our determination another way, a reversal of the *I.D.* on any of the designated issues would demand an illation that the evidence adduced here exposed that Naleszkiewicz was beyond deaf, dumb and blind, but additionally afflicted with an I.Q. that scarcely encroached upon double digits. No such evidence exists. Because of the posture taken by Naleszkiewicz in this proceeding, it is not possible to opine on the question

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lack of candor, notwithstanding its earlier concern that the ALJ presiding in that case did not make any specific demeanor findings. *TeleSTAR, Inc.*, 3 FCC Rcd 2860 (1988), *aff'd per judgment*, 886 F.2d 442 (D.C. Cir. 1989)(Table).

[32] *See I.D.*, para. 72 (quoting Tr. 543).

[33] *See id.; see also supra* para. 13 & note 15.

[34] *See id.*, para. 77.

[35] *But see supra* note 18 (Schuman recalls that Naleszkiewicz was definitively informed of the facts earlier than she claims).

[36] *See supra* para. 20.

[37] Though we need not reach Issues 5 and 6 to hold that Naleszkiewicz is not qualified for this instant permit, *see TeleSTAR, Inc. supra* (dishonest common carrier applicant unqualified), we find no basis in the record or the exceptions upon which to overturn the *I.D.* on these latter issues. It is inherently incredible that, considering Naleszkiewicz' own estimate that this Kansas cellular permit might have a transfer value of many millions of dollars, that (1) she took no notice of, or didn't understand, Fishman's express reference to para. 62 of the *HDO;* (2) that she did not discuss the appearance notice deadline with either Fishman or Schuman during their early December 1989 discussions; but (3) that she wrote to Schuman on January 3, 1991 *explicitly* adverting to the need for the filing of a "notice of appearance" (therewith enclosing a copy of the pertinent rules); and yet (4) that she had no actual notice of the filing date precisely specified in the *HDO* (and the FCC rules she personally sent to Schuman). No inference can be drawn from the record facts other than that it was not until January 29, 1991 that she was financially able (barely) to retain counsel. All the rest waxes utterly bogus. *Cf. also* Tr. of Oral Arg. at 1283 (Schuman maintains he hasn't "been paid a dime to take this [Board] appeal," though he does not mention whether a grant of this permit might alter that pecuniary circumstance).

of whether the Naleszkiewiczes started out with any intent to commit fraud, and later perjury, or whether they merely spent with such prodigality on themselves that they precipitated the financial crisis that inevitably brought them down. But that conundrum would have been a more appropriate inquiry for a criminal jury, had a guilty plea not been taken. For our administrative purposes, that query is irrelevant, since the narrow charge on this humble Board is limited to whether the *I.D.* is decisionally infirm. It is not so in the slightest, and on that we concur with the Common Carrier Bureau and the other parties supporting the *I.D.*

29. ACCORDINGLY, the pleadings filed by the parties with respect to oral argument are DISMISSED as moot.

30. IT IS FURTHER ORDERED, That the application of Nancy Naleszkiewicz (File No. 10494-CL-P-430-A-89) for a construction permit to establish a new cellular system IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 91-2

In the Matter of

Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services — RM-6196

and

Reinstatement of Dismissed Interactive Video Data Services License Applications

SECOND MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1993; Released: April 23, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. On January 16, 1992, the Commission adopted a *Report and Order* (*Report*)[1] in this proceeding that, *inter alia*, established a frequency allocation and service rules for the Interactive Video and Data Service (IVDS). The purpose of the *Report* was to make available an allocation of radio spectrum that licensees could use to provide a variety of radio-based interactive services to the public. In response to six petitions which requested reconsideration of certain aspects of the *Report*, a *Memorandum Opinion and Order* (*MO&O*)[2] variously granted and dismissed those requests. Following the adoption of the *MO&O*, the Petition for Further Reconsideration of Radio Telecom and Technology, Inc. (RTT) and the Petition for Reconsideration of Mr. William E. Zimsky and the Committee to Preserve Statutory Fees (jointly referred to as CPSF), were filed requesting that we reconsider certain decisions in the *MO&O*. This *Second Memorandum Opinion and Order* grants the CPSF and denies in part and dismisses in part the RTT petitions for reconsideration. In addition, it makes minor editorial clarifications to the IVDS rules.[3]

II. PLEADINGS

2. RTT seeks reconsideration of the decision in the *MO&O*, that, in response to a petition from TV Answer, Inc. (TV Answer),[4] revised Section 95.859(a) to allow higher CTS antennas where there would be a corresponding reduction in power.[5] RTT, a petitioner in the *MO&O* proceeding,[6] did not comment on TV Answer's petition. Nonetheless, RTT now states that, by adopting the rule change in *MO&O*, we did not give equal consideration to RTT's technology which, RTT contends, needs higher antenna heights with no reduction in power in order to operate efficiently. RTT contends that because it must obtain a waiver in order to deploy its form of IVDS technology, the IVDS rules are not drafted "generically."[7] In addition, RTT queries whether the waiver requirement contained in Footnote 51 of the *Report* must apply to prospective IVDS licensees electing to use RTT's technology.[8] Lastly, RTT states that it is impractical to require IVDS applicants selected by a lottery to submit their Form 574 applications to the Commission within 48 hours.

3. CPSF seeks reconsideration of the decision in the *MO&O* concerning the IVDS application fee. CPSF states, *inter alia*, the following: 1) the $1,400 IVDS application fee is unconstitutional because it is unrelated to our administrative costs for processing applications, 2) the requirement to file for a minimum number of 40 CTS stations, on which the $1,400 fee is based ($35 x 40 = $1,400), is not reasonable, and 3) we are not authorized to collect any application fee because Section 8(g) of the Communications Act,[9] does not explicitly authorize an application fee for IVDS.

4. TV Answer filed comments in opposition to the CPSF petition for reconsideration.[10] TV Answer states, *inter alia*, that the requirement to file for a minimum number of 40 cell transmitter stations (CTSs) prevents applicants from submitting low estimates for the number of CTSs required and is consistent with the goals stated in the *Report* of reducing licensing burdens, increasing flexibility and providing early promotion of IVDS.[11]

5. RTT also filed comments in response to the CPSF petition.[12] RTT takes no position on CPSF's substantive positions, but rather stresses that any pending appeals of the IVDS application fee decision should not delay holding IVDS lotteries or granting IVDS licenses.[13]

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[1] 7 FCC Rcd 1630 (1992).
[2] 7 FCC Rcd 4923 (1992).
[3] *See* Appendix.
[4] *See MO&O* 7 FCC Rcd at 4923.
[5] *See MO&O* 7 FCC Rcd at 4924.
[6] *Id.*
[7] *See* RTT petition at 2-6. Specifically, RTT contends that its technology will not interfere with TV Channel 13 regardless of the CTS antenna height or power. Therefore, RTT argues that we should reconsider our antenna height and power limitations in the IVDS rules.
[8] *Id.* at 6-7.
[9] 47 U.S.C. § 158(g).
[10] *See Opposition to Petition for Reconsideration and Comments of TV Answer, Inc.* (TV Answer comments). In addition, Interactive Network filed comments which, because they are substantively indistinguishable from the TV Answer comments as they pertain to the CPSF petition, are not discussed separately.
[11] *See* TV Answer comments at 5-7.
[12] *See Comments RE Petitions for Reconsideration*, Radio Telecom and Technology (RTT comments).
[13] *See* RTT comments at 3-6. Since the filing windows for IVDS applications were opened, we have received a great number of petitions for reconsideration from persons who have had their applications dismissed for failing to submit the $1,400 IVDS application fee. All of these petitions are associated with either CPSF or Edward M. Johnson.

6. In addition, two parties request clarifications of the IVDS rules. First, Keller and Heckman seeks confirmation that trusts are eligible to hold IVDS licenses.[14] Second, educational and governmental entities represented by Dow, Lohnes and Albertson (Dow Lohnes) seek clarification of the following issues: 1) whether educational and governmental entities are eligible to be IVDS licensees, 2) whether such entities may compete with commercial applicants for IVDS licenses, and 3) whether the filing fee exemption contained in Part 1 of the Commission's Rules, 47 C.F.R. Part 1, applies to IVDS license applicants.[15]

III. DISCUSSION

7. For reasons set forth below, we grant the CPSF petition for reconsideration, deny in part and dismiss in part the RTT petition for reconsideration and make minor editorial clarifications to the IVDS rules.

A. RTT Petition.

8. After weighing concerns about potential interference with TV channel 13 and the AMTS maritime service, we adopted a number of technical parameters including antenna height and power limits to avoid interference.[16] These parameters were based on the licensee employing a low power, cellular-like system.[17] In the *MO&O*, we did not change the degree of protection from interference that TV channel 13 stations received in the *Report*. We merely applied the concept of equivalent protection to allow licensees additional flexibility.[18] RTT contends that we should have considered its unique technology as providing interference protection equivalent to using low power, cellular-like systems and allowed entities to operate routinely at higher antenna heights with no reduction in power if they employ its technology.[19] RTT's proposal, however, would require us to specify, in detail, RTT's unique technology in the rules. We have found specifying unique technologies in the rules to be administratively burdensome.[20] We strive to adopt general, flexible rules and to accommodate unique technologies, at least initially, through the Commission's waiver process. We continue to believe that this approach should be applied here.[21] Therefore, the waiver requirement described in Footnote 51 of the *Report* applies to, *inter alia*, prospective IVDS applicants electing to use unique technology that needs higher antenna heights with no reduction in power in order to operate efficiently.[22] Accordingly, RTT's petition concerning this issue is denied. Lastly, RTT's concern relating to the 48 hour application deadline pertains to a decision in the *Report* and not in *MO&O*. Therefore, RTT's petition concerning this decision is untimely under Section 1.106(f) and is dismissed.[23]

B. CPSF Petition.

9. As noted in the *Report*, IVDS is a personal radio service analogous to the General Mobile Radio Service (GMRS).[24] Although, for administrative convenience, we created a new rule subpart for IVDS, we also amended our GMRS rules to reflect that IVDS is, in essence, a subset of GMRS.[25] The statutory fee for GMRS is $35 per call sign. Therefore, we reject CPSF's contentions that we are not authorized to collect a fee per call sign from IVDS licensees.

10. Nonetheless, we agree with CPSF's contention that the requirement to file for a minimum number of 40 call signs, one for each of 40 CTS stations, may be, under certain circumstances, an unnecessary burden on IVDS applicants. In recognition of the lack of homogeneity in Metropolitan Service Areas (MSAs) and Regional Service Areas (RSAs) as well as the ability of IVDS technologies to cover large areas with fewer than 40 CTSs, we have reconsidered the need for and the fairness of treating all applications as requests for a 40-location blanket license with 40 call signs. Accordingly, we are deleting the requirement for IVDS applicants to apply initially and submit payment for a minimum of 40 call signs for the CTS base stations. Rather, an IVDS licensee may submit its application for a blanket license under one call sign, regardless of the number of CTS base stations it intends to construct. Therefore, the new application fee for an IVDS system license will be $35, and one call sign will be awarded.[26] Applications that require special administrative review because of antenna height must be individually licensed through the filing of separate Form 574s.[27]

11. As a result of this action, IVDS applications that included at least $35 but were dismissed for failure to be accompanied by the $1,400 IVDS application fee will be reinstated.[28] Further, IVDS applicants that paid an IVDS application fee based on the 40 CTS requirement shall be refunded the amount greater than the basic $35 per call

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[14] *See* letter from Keller and Heckman, Washington, D.C., to the Chief, Special Services Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. (December 10, 1992).

[15] *See* Ex Parte Presentation of Dow Lohnes (September 25, 1992).

[16] *See Report* 7 FCC Rcd at 1632-1641.

[17] Using low power, cellular-like systems has long been recognized as a way of reducing both adjacent and co-channel interference potential.

[18] We have taken this approach in other private radio services with successful results. *See, e.g.* 47 C.F.R. §§ 90.619 and 90.635.

[19] Specifically, RTT contends that its technology will not interfere with TV Channel 13 essentially regardless of the CTS height or power. Therefore, RTT argues that we should reconsider our antenna height and power limitations in the IVDS rules. RTT petition at 4-5.

[20] For example, once we specify the technical characteristics of a unique technology in the rules, any changes in the characteristics would require a rule making proceeding.

[21] We note that RTT states that its IVDS technology can operate under the current IVDS rules, but because of certain technical characteristics, it could operate more efficiently at higher antenna heights.

[22] If RTT or any other similary situated party can satisfy the Commission's concerns regarding both potential adjacent and co-channel interference, then we will entertain waivers of our rules limiting antenna height and power.

[23] 47 C.F.R. § 1.106(f). *See also* Section 1.429(i)(stating that "[a]ny order disposing of a petition for reconsideration which modifies rules adopted by the original order is, *to the extent of such modification*, subject to reconsideration in the same manner as the original order.")(Emphasis added).

[24] *See Report* 7 FCC Rcd at 1639-1640.

[25] 47 C.F.R. § 95.1.

[26] *See* Appendix.

[27] *See Report* 7 FCC Rcd at 1639. A $35 fee will be required for each such Form 574 filed and a separate call sign will be assigned.

[28] *See* note 13, *supra*.

sign fee.[29] This minor rule change, however, does not affect the IVDS filing windows previously announced in Public Notices.[30]

C. Requests for Clarification.

12. With respect to the request of Keller and Heckman, we note that because trusts are typically eligible for private radio licenses,[31] it would appear that their omission from the list in our rules of entities eligible for IVDS licenses was inadvertent.[32] Accordingly, we are making a minor editorial revision to Section 95.813(a) of the Commission's Rules to clarify that trusts are eligible for IVDS station licenses.[33] Regarding the concerns of Dow Lohnes, we agree with their interpretation of our decisions in the *Report* concerning educational and governmental entities. Accordingly, we confirm that 1) educational and governmental entities are eligible to be IVDS licensees, 2) such entities may compete with commercial applicants for IVDS licenses, and 3) IVDS license applicants that qualify for the filing fee exemption contained in Part 1 of the Commission's Rules, 47 C.F.R. Part 1, are exempt from the IVDS application fee.

IV. ORDERING CLAUSES

13. In view of the foregoing and pursuant to the authority contained in Sections 4(i), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 405, and Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i), IT IS ORDERED THAT the Petition for Reconsideration filed by Radio Telecom and Technology, Inc., IS DENIED IN PART and DISMISSED IN PART.

14. IT IS FURTHER ORDERED THAT, pursuant to the authority contained in Sections 4(i), 303(r) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 405, and Section 1.429(i) of the Commission's Rules, 47 C.F.R. § 1.429(i), the Petition for Reconsideration filed by William Zimsky and the Committee to Preserve Statutory Fees IS GRANTED as indicated herein.

15. IT IS FURTHER ORDERED THAT pursuant to the authority contained in Sections 4(1) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 95 of the Commission's Rules IS AMENDED as set forth below effective [30 days after publication in the Federal Register].

16. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

17. For further information concerning this Order, contact Marc S. Martin, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, mail stop 1700C2, at (202) 632-6497.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FINAL RULE

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 95 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 95.813(a) is amended by, in subparagraph (3), deleting the "." and replacing it with ", or" and adding a new subparagraph (4), to read as follows:

§ 95.813 Eligibility.

(a) * * *

(4) The entity is a trust and no beneficiary is a representative of a foreign government.

* * * * *

3. Section 95.815 is amended by revising the first sentence of paragraph (e) to read as follows:

§ 95.815 License Application.

* * * * *

(e) Each IVDS system license is licensed for an unlimited number of CTSs that meet the 6.1 meter (20 foot) criteria.

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[29] For example, applicants that submitted a $1,400 application fee would be refunded $1,365.

[30] *See, e.g.*, Public Notices of July 17, 1992 (DA-92-944), July 31, 1992 (DA-92-1028), and August 14, 1992 (DA-92-1084).

[31] *See, e.g.*, 47 C.F.R. §§ 90.7 and 94.3 (stating that a "person" includes a "trust" for license eligibility purposes).

[32] 47 C.F.R. § 95.813(a).

[33] *See* Appendix.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-226

In the Matter of

Amendment of Section 73.202(b), RM-8082
Table of Allotments,
FM Broadcast Stations.
(Seminole, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 5, 1993; Released: April 23, 1993

By the Chief, Allocations Branch:

1. At the request of One Ten Broadcast Group, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 6811 (1992), proposing the substitution of Channel 290A for Channel 288A at Seminole, Oklahoma, and the modification of Station KIRC's license to specify the alternate Class A channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 290A for Channel 288A at Seminole since it could enable Station KIRC to improve its facilities to 6 kW. As proposed, we will modify Station KIRC's license to specify Channel 290A. Channel 290A can be allotted to Seminole in compliance with the Commission's minimum distance separation requirements at Station KIRC's licensed site.[1] Use of this site does not negate the short-spacing to the allotment coordinates for Channel 289A at Spencer, Oklahoma. Therefore, issuance of a license to Station KIRC on Channel 290A may be withheld until Station KROU is licensed on Channel 289A at Spencer. *See Boyne City, Michigan*, 6 FCC Rcd 2039 (1991).

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Seminole, Oklahoma	290A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of One Ten Broadcast Group, Inc., for Station KIRC, Seminole, Oklahoma, IS MODIFIED to specify operation on Channel 290A, in lieu of Channel 288A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KIRC's license, BLH-920820KA, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-920820KA, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 290A at Seminole are North Latitude 35-12-53 and West Longitude 96-44-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

GTE HAWAIIAN TELEPHONE CO., INC. File No. I-T-C-93-040

Application for authority
to acquire and operate facilities
for direct service between
Hawaii and Vietnam.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 9, 1993; Released: April 23, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application,[1] filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between Hawaii and Vietnam by GTE Hawaiian Telephone Co., Inc. (HTC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-040 IS GRANTED, and HTC is authorized to:

a. lease from Comsat and operate one 2.048 Mbps satellite half-circuit and one 1.554 Mbps satellite half-circuit between an appropriately licensed earth station in Hawaii and an appropriate INTELSAT satellite over the Pacific Ocean Region (POR), connecting with similar half-circuits between the satellite and an earth station in Vietnam furnished by HTC's correspondent Vietnam Telecom International (VTI);

b. use the 2.048 Mbps capacity to provide HTC's regularly authorized services, including IMTS, between Hawaii and Vietnam; and

c. use the 1.554 Mbps capacity to provide private line service between Hawaii and Vietnam.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondent in Vietnam, and HTC shall file a copy of the agreement, including the applicable accounting rate, with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in §43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that our authorization of HTC to provide private lines is limited to the provision of such private lines only between Hawaii and Vietnam -- that is, private lines which originate in Hawaii and terminate in Vietnam or which originate in Vietnam and terminate in Hawaii. In addition, HTC may not --and HTC's tariff must state that HTC's customers may not -- connect private lines provided over these facilities to the public switched network at either the Hawaii or the Vietnam end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that Vietnam affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992).

6. IT IS FURTHER ORDERED that neither HTC nor any persons or companies directly or indirectly controlling or controlled by HTC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other U.S. carrier by reason of any concession, contract, understanding, or working arrangement to which HTC or any persons or companies controlling or controlled by HTC are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. IT IS FURTHER ORDERED that the continued effectiveness of this authorization is contingent upon the applicant's compliance with applicable Treasury Department Regulations regarding service to Vietnam.[2]

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

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[1] HTC filed its application on December 1, 1992, and amended it on December 8, 1992.

[2] *See* Department of the Treasury, Office of Foreign Assets Control Regulations, 31 C.F.R. §500.571, effective April 23, 1992. *See also* note 3 of 7 FCC Rcd 2891 (1992).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EMI Communications Corporation — File No. I-T-C-93-041

For Authority Under Section 214 to Operate as a Common Carrier Utilizing Domestic Terrestrial Microwave Channels of Communications Between Rochester, New York and a Receive Station Located in Ontario, Canada

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: April 14, 1993; Released: April 23, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by EMI Communications Corporation (EMI)[1] pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS ORDERED that application File No. I-T-C-93-041 IS GRANTED and EMI is authorized to operate, as a common carrier, to provide three channels of communication between Rochester, New York and Ontario, Canada for the delivery of television video and associate audio signals.

2. IT IS FURTHER ORDERED that this authorization is conditioned on the Department of State's continued assurance that U.S. copyright interests are adequately protected by Canada (*e.g.*, just, reasonable and nondiscriminatory treatment). If the Executive Branch determines that U.S. interests are not adequately protected, it may wish to consider and inform the Commission of other appropriate action.[2]

3. IT IS FURTHER ORDERED that neither EMI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which EMI or any persons or companies controlling or controlled by EMI are parties.

4. IT IS FURTHER ORDERED that EMI shall file copies of any operating agreement entered into by itself or its parent/affiliate with its correspondent in Canada within 30 days of its execution.

5. IT IS FURTHER ORDERED that EMI shall file tariff provisions pursuant to Section 203 of the Communications, Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this decision.

6. IT IS FURTHER ORDERED that EMI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Communications Act, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the authority granted herein to establish channels of communication between microwave stations at Rochester, New York and Ontario, Canada for the authorized services herein does not dispense with the requirement that the U.S. microwave stations shall be authorized under Title III of the Communications Act.

8. IT IS FURTHER ORDERED that the authority granted herein is limited to the delivery of television video and associated audio signals. Any other service that EMI wishes to provide requires additional authorization pursuant to Section 214 of the Communications Act.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent in Canada.

10. This Order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] EMI is a non-dominant domestic and international common carrier. EMI is the licensee of and operates an extensive common carrier microwave network throughout the Northeast United States, with communications to Ontario, Canada.

[2] Letter from Ambassador Bradley P. Holmes, United States Coordinator and Director, Bureau of International Communications and Information Policy, Department of State, to Chairman Alfred C. Sikes, Federal Communications Commission, April 29, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Long Distance Service
of Washington, Inc.

and File No. I-T-C-93-107-TC

New Cable Inc.

For authority pursuant to Section 214
of the Communications Act of 1934, as
amended, for assignment of
authorization to resell international
switched voice services

MEMORANDUM, OPINION AND ORDER

Adopted: April 14, 1993; Released: April 23, 1993

By the Chief, International Facilities Division:

1. On February 11, 1993, Long Distance Service of Washington, Inc. (LDS) and New Cable Inc. (New Cable) filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority for New Cable to acquire the assets and Section 214 authorization of LDS.[1] The application was put on public notice on February 24, 1993, and no comments were received.

2. LDS is a privately-held Delaware corporation that has authority to resell international switched message telephone service between the U.S. and various international points.[2] LDS operates under the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[3] LDS is a full service long distance provider serving large and small businesses operating throughout the Bell Atlantic states pursuant to the Commission's domestic competitive carrier policies.[4]

3. New Cable is a Delaware corporation and a wholly-owned subsidiary of Litel Telecommunications, Inc. (Litel) and a sister company to Litel Telecommunications Corp. d/b/a LCI International, which provides interexchange telephone service to various locations throughout the United States as a non-dominant carrier pursuant to the Commission's domestic competitive carrier policies, and resells international switched voice services pursuant to the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[5]

4. The application states that an agreement has been reached between LDS, Richard J. Rice and Litel, and that agreement will be assigned by Litel to New Cable. The agreement provides for New Cable to purchase all of the assets of LDS used by LDS to provide the services described in its Section 214 authorization. The transaction will permit New Cable to continue providing high quality long distance services to the customers of LDS. New Cable will continue to provide service pursuant to LDS's tariff.

5. In view of the foregoing, we conclude that the transfer of control of LDS's assets and Section 214 authorization to New Cable will not adversely affect the public interest.

6. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Long Distance Service of Washington, Inc. and New Cable Inc., File No. I-T-C-93-107-TC, IS GRANTED and we consent to the transfer of control of LDS's assets and Section 214 authorization originally granted in File No. I-T-C-88-017 (*see* n.2) to New Cable Inc.

7. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that New Cable must continue to maintain tariffs for the services authorized in this order.

8. IT IS FURTHER ORDERED that New Cable must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

9. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

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[1] The original application was filed on behalf of New Cable. By letter of April 13, 1993, it was amended to include LDS as an applicant. Cite letter.

[2] Long Distance Service of Washington, Inc., File No. I-T-C-88-017, 3 FCC Rcd 33 (1988).

[3] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 6 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies)*.

[4] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983).

[5] Litel Telecommunications Corp. File No. I-T-C-86-154, mimeo 7107, released September 25, 1986; Litel Telecommunications Corp. File No. I-T-C-90-028, filed November 2, 1989, (pending); Litel Telecommunications Corp. *et al*, File No. I-T-C-92-184, Letter from Chief, International Facilities Division, to David W. Karp, July 27, 1992; Tri-J Limited File No. I-T-C-87-063, 2 FCC Rcd 1763 (1987); Phoenix Telecommunications Corp., Inc. File No. I-T-C-87-068, 2 FCC Rcd 1782 (1987); Charter Network Co. *et al* File No. I-T-C-89-170-TC, 4 FCC Rcd 8652 (1989); LCI Communications, Inc. *et al* File No. I-T-C-90-032(A), Letter from Chief, International Facilities Division, to Randall B. Lowe, December 15, 1989; Charter Network Co., File No. I-T-C-93-001-TC, Letter from Chief, International Facilities Division, to Randy B. Lowe, February 10, 1993.

10. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-116

In the Matter of

Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service

In Re

Skytel Corporation MSD 92-19
American Paging Inc.

For waiver of Sections 22.505(c)(2), 22.506(e) and 22.506(f)(2) to operate transmitters at higher power

NOTICE OF PROPOSED RULE MAKING AND ORDER GRANTING PETITION FOR WAIVER

Adopted: April 9, 1993; Released: April 23, 1993

Comments Due: June 17, 1993
Reply Comments Due: July 2, 1993

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rule Making seeks to reexamine the Public Land Mobile Service (PLMS) rules regarding effective radiated power (ERP) for facilities authorized in the 931 MHz band. In addition, we are granting a rule waiver to Skytel Corporation, during the pendency of this rule making, to allow it to operate on frequency 931.4375 MHz at a higher ERP.[1]

II. BACKGROUND

2. The PLMS rules were revised several years ago, to permit higher ERP for facilities authorized to operate in this service. *See Height and Power Increases in the Public Mobile Service*, 4 FCC Rcd 5303 (1989), *modified* 5 FCC Rcd 4604 (1990). The maximum permissible power for transmitters operating in the 931 MHz band was increased to 3500 watts ERP. Any transmitter on the nationwide network paging frequencies[2] may be operated at 3500 watts ERP regardless of whether the licensee has constructed any co-channel transmitters in the vicinity. However, paging transmitters on the other 931 MHz frequencies may be operated with 3500 watts ERP only when their interference area is totally encompassed by the composite interfering contour of existing co-channel transmitters of the same licensee. Otherwise, such transmitters are limited to a maximum ERP of 1000 watts. Therefore, a carrier who wishes to operate a 3500 watt paging transmitter on a frequency in the 931 MHz band, other than the nationwide network frequencies, must first apply, receive authorization for, and construct several 1000 watt transmitters covering the same area.

III. DISCUSSION

3. Since the previous rule making, we have authorized numerous 931 MHz band paging facilities in all major metropolitan areas. There are currently about 10,700 transmitters licensed in the 931 MHz band, excluding nationwide network transmitters. Although 931 MHz paging remains the fastest growing segment of the Public Land Mobile Service, we believe that much of the early "pent-up" demand for new paging systems has been satisfied, and that the current licensing activity consists in large part of applications for expansion of existing systems. This represents a maturing of this industry. Thus, applicants wish to design their systems with fewer transmitters of higher power and the current requirement of surrounding transmitters is outdated. In view of these changed conditions, we believe that the concerns which led to some of the more restrictive provisions in our current power rules may no longer be applicable and is unnecessary to protect against interference. Therefore, a further examination of these rules is warranted.

4. As stated above, we allow transmitters operating on nationwide network paging frequencies to be operated at maximum ERP when these transmitters are initially established. No co-channel interference is possible, because each licensee is exclusively assigned a frequency throughout the nation. *Height and Power Increases*, 5 FCC Rcd at 4608. Operation at 3500 watts ERP has proven to be a feasible and cost effective way for nationwide paging licensees to rapidly expand coverage. Higher power is also beneficial in providing better building penetration, and, in some cases, overcoming man-made noise.

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[1] This paging frequency augments Skytel's nationwide paging network on frequency 931.9375 MHz.

[2] Three frequencies (931.8875, 931.9125 and 931.9375 MHz) are reserved for use by nationwide network paging operators. *See Allocation of Spectrum in the 928-941 MHz Band*, 89 FCC 2d 1337 (1982), *recon.*, 92 FCC 2d 631 (1982), *recon. (Part 2)*, 93 FCC 2d 908 (1983), *aff'd sub nom., NARUC v. FCC*, No. 83-1485 (D.C. Cir. Jan.17, 1984)(mem.), *Third Report and Order*, 97 FCC 2d 900 (1984), *recon.*, 57 RR 2d 1416 (1985). Thirty-seven other frequencies were made available for regional and local one-way paging service. *Id.*

5. In the previous proceeding, however, we declined to allow 3500 watt operation on the other 931 MHz frequencies except where the transmitter involved is completely surrounded by other transmitters of the same licensee, which operate at 1000 watts. *Id.* at 4608-12. We allowed 3500 watt operation only for "internal" transmitters located completely within existing systems because the surrounding transmitters ensure that no co-channel station of another licensee is close enough to receive interference from, or cause interference to, the higher power transmitter.[3] However, we also adopted geographical distance separation requirements for the higher power transmitters and all stations operating on the 931 MHz band.[4] *Id.*

6. We tentatively conclude that we may now allow 3500 watt operation of all stations in the 931 MHz frequency band without requiring existing surrounding transmitters. We believe that this change would be in the public interest since it will afford the benefits of higher power operation without unduly increasing the risks of interference since the potential for interference is not increased with the operation of fewer transmitters at higher power. In addition, increased power limits will allow for greater flexibility for these paging systems since they could use fewer transmitters to cover the same geographic area with the concomitant result in efficiencies of scale, reduction in costs, and resulting benefits for consumers.

7. Accordingly, we propose to allow all stations in the 931 MHz band to be initially operated with any ERP up to a maximum of 3500 watts. We propose to eliminate the height-power limits contained in Section 22.505(b) of the Commission's Rules, 47 CFR § 22.505(b). However, we will continue to require that carriers maintain the geographic separation criteria for co-channel stations. *See* Section 22.503(d), 47 CFR § 22.503(d). Stations in this band will continue to be classified in accordance with Section 22.502(c), 47 CFR § 22.502(c), which classifies stations according to antenna height above average terrain and maximum ERP.[5]

8. Consequently, we propose to remove sections 22.505(b), 47 CFR § 22.505(b); 22.505(c)(2), 47 CFR § 22.505(c)(2); and 22.506(f)(2), 47 CFR § 22.506(f)(2). We also propose to revise Section 22.506(e), 47 CFR § 22.506(e). We will continue to allow additional transmitters to be established within existing contours in accordance with Section 22.117(b), 47 C.F.R. §22.117(b).

9. We seek comment on these proposals, including the potential for adjacent channel interference resulting from these power increases. Furthermore, we seek comment on whether the separation distances in our rules are adequate to protect future and existing stations from interference. This would include the co-channel interference potential to Canada and Mexico. Nevertheless, we tentatively conclude that existing coordination procedures[6] will ensure that increases in power do not result in harmful interference to licensees in neighboring countries. However, because increased power may require modifications of our current coordination procedures between Canada and Mexico, any changes to these procedures will be specified at a later date.

IV. HEIGHT-POWER WAIVER REQUESTS

A. Background

10. Skytel Corporation (Skytel) requests a waiver of Sections 22.505(c)(2), 22.506(e), and 22.506(f)(2) of the Rules, 47 CFR §§ 22.505(c)(2), 22.506(e), 22.506(f)(2), to operate transmitters on frequency 931.4375 MHz at 3500 watts ERP, without first constructing facilities limited to 1000 watts ERP. *See Common Carrier Public Mobile Services Information*, Public Notice, Report No. 21324 (Jan. 8, 1992).[7] American Paging Inc., (American) supports Skytel and requests a waiver of the same rule sections, to operate transmitters on frequency 931.4875 MHz at 3500 watts ERP in Florida and several other states (Georgia, Alabama, Mississippi, and Louisiana).

11. Skytel seeks a waiver of the rules in order to integrate its paging facilities on 931.4375 MHz, which is not a nationwide network paging frequency, with the facilities on its nationwide network paging frequency, 931.9375 MHz. Skytel operates paging transmitters on 931.4375 MHz across much of the nation at the same sites it operates nationwide network facilities on frequency 931.9375 MHz. The transmitters on the nationwide network paging frequency can be operated at 3500 watts ERP. However, the transmitters on 931.4375 MHz cannot exceed 1000 watts, unless Skytel first builds numerous other transmitters surrounding them. Skytel intends to fully integrate its nationwide paging network using both frequencies. In order to do this, Skytel argues that service must be provided on both frequencies over the same geographic area, which can best be accomplished by operating transmitters at the same locations and power levels. In addition, Skytel claims that

[3] In the previous rule making we did not adopt a proposed method to determine the co-channel interference potential of 3500 watts transmitters because we concluded certain deficiencies would not make the method workable with our automated system for the assignment of 931 MHz paging channels. At that time, our computer program for paging frequency assignment was coded on the assumption that all transmitters of different applicants must be separated by at least 70 miles. Since then, this program has been extensively updated to take into account all of the separation distances in the rules. The current geographic separation distances range from 70-171 miles depending on the station classification. *See* Section 22.503(d).

[4] Although we are concerned with intermodulation interference, our experience thus far, with 931 MHz nationwide paging networks operating transmitters at 3500 watts, indicates that this problem has not been widespread.

[5] Additionally, we also tentatively find it in the public interest to continue to maintain the reliable service area and interference area parameters established in the rules. *See* Section 22.504(b)(2), 47 C.F.R. § 22.504(b)(2).

[6] For instance we have an agency-to-agency understanding between the Federal Communications Commission and the Canadian Department of Communications for sharing arrangements in portions of the 929-932 MHz band. *See generally Waiver of Section 22.117(b) of the Rules*, DA 92-1507 (Com. Car. Bur. Nov. 13, 1992). *See also* Section 1.955 of the Rules, 47 C.F.R. § 1.955; *Amendment of Parts 21, 22, 23 and 25 of the Rules to Require Reporting of Station Frequency and Technical Parameters for Registration by the Commission with the International Frequency Registration Board*, 7 FCC Rcd 5066 (1992). We have bilateral telecommunications agreements with Mexico. *See generally U.S. and Mexico Sign Major Bilateral Telecommunications Agreements in Mexico City*, Public Notice No. 24390, released Aug. 12, 1992.

[7] Paging Plus, Inc., initially opposed Skytel's request but withdrew its opposition on May 11, 1992.

grant of the waiver will increase the scope of services available to nationwide paging subscribers and possibly increase the number of subscribers. Furthermore, Skytel maintains that grant of the waiver will reduce the number of transmitter sites for the system.

12. American operates a satellite-linked network of over 100 base stations to provide regional paging service on 931.4875 MHz in Florida and contiguous states. It is authorized to use this frequency in Florida, parts of Georgia, Alabama, Mississippi, and Louisiana. American requests a waiver of the above cited rules, to operate its regional system at 3500 watts ERP. According to American, this will enable the company to provide a more cost-effective and competitive service offering to the public. American also claims that its waiver is needed to create competitive parity, if we grant Skytel's request. American maintains that a grant to Skytel and not to American would be irrational, citing *Northeast Cellular Telephone Company*, 897 F.2d 1164 (D.C. Cir. 1990).

B. Discussion

13. Section 22.19 of the Commission's Rules establishes the requirements for waiver requests. An applicant must demonstrate: (a) that the underlying purpose of the rule will not be served in the absence of a waiver, and that grant of the waiver is in the public interest; or (b) that the unique facts and circumstances of a particular case render application of the rule inequitable or contrary to the public interest and that there is no reasonable alternative. 47 CFR § 22.19. *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

14. Skytel has met the requirements of Section 22.19 of the Rules under both alternatives. We recently stated that Skytel (a subsidiary of Mobile Telecommunication Technologies Corp.) could use frequency 931.4375 MHz to augment its nationwide network. *Mobile Telecommunications Technologies Corp.*, 6 FCC Rcd 1938 (Com. Car. Bur. 1991), *aff'd*, 7 FCC Rcd 4061 (1992). Operation of the 931.4375 MHz channel fully integrated with the nationwide network channel is in the public interest. We agree with Skytel, that this will increase the capacity available for nationwide network paging service. Therefore, a waiver of the rule in this case is in the public interest. Granting the waiver will increase the scope of services available to nationwide network paging subscribers and possibly increase the number of subscribers. In addition, granting the waiver will benefit the public by reducing construction costs, and carrier resources devoted to this service, due to a reduction in the number of transmitter sites necessary for the system, thereby lowering the costs at which the service can be made available to the public. Consequently, grant of the waiver will also reduce environmental and civic concern over sites since the number of transmitters will be diminished. There are no reasonable alternatives to the waiver that could achieve these public interest benefits.

15. Furthermore, the underlying purpose of the rule will not be undermined by granting the instant waiver. Insofar as Skytel is the only carrier that has obtained authorizations to use 931.4375 MHz throughout the nation, it is unique. There are currently no facilities of other carriers operating on 931.4375 MHz in the vicinity of Skytel's transmitters. Therefore, it is highly unlikely that Skytel will cause co-channel interference to any other paging systems by transmitting at an ERP of 3500 watts. Since the underlying purpose of the rule -- the prevention of co-channel interference -- is not undermined by granting Skytel's request, a waiver is appropriate. We also agree with Skytel that channel spacing in the 931 MHz band allocation reduces the likelihood of adjacent channel interference. *See, e.g., Flexible Allocation of Frequencies*, 4 FCC Rcd 1576 (1989), *Flexible Paging II*, 4 FCC Rcd 6415 (1989), *recon. (Part I)*, 5 FCC Rcd 6199 (1990), *recon. (Part II)*, 7 FCC Rcd 4549 (1992).

16. Accordingly, a waiver is warranted under Section 22.19 of the Rules. Therefore, Skytel will be allowed to operate its proposed paging facilities on 931.4375 MHz at any ERP up to but not exceeding 3500 watts, provided that the distance separation criteria of Section 22.503(d) are met. The waiver is granted on the condition that Skytel must submit FCC Form 401, including a separate Schedule B, for each transmitter where the height-power class is changed. For transmitters where the height-power class is not changed, Skytel must notify the Commission using FCC Form 489, with Schedule B attached. The forms must include the appropriate fees.

17. We will entertain waiver requests to increase power during the pendency of this rule making proceeding, as long as the carrier can satisfy the requirements of Section 22.19 of the Rules and demonstrate the lack of interference to co-channel stations. In addition, the requirements specified in paragraph 16 must be followed. Furthermore, applicants requesting waivers of Sections 22.505(c)(2), 22.506(e) and 22.506(f)(2) must comply with Sections 22.502(c) and 22.504(b)(2). Pursuant to these criteria we conclude that we must deny American's waiver request because it has not demonstrated that it will not cause interference to co-channel stations in proximity to its system.[8] In this connection, American may wish to re-submit its waiver request following the requirements specified here, and in paragraph 16, *supra*.

[8] We disagree with American that its circumstances are the same as those of Skytel. Unlike Skytel, American has not shown lack of interference to co-channel stations. American is not a nationwide network operator, and therefore, does not benefit from the policy considerations relating to nationwide operators. For instance, Skytel can use frequency 931.4375 to augment its nationwide service. Skytel has authority to provide paging service on frequency 931.4375 MHz in a substantial number of cities. Skytel is the only carrier that has obtained authorizations to use 931.4375 MHz throughout the nation. Contrary to American's arguments, Skytel's case is distinguishable from *Northeast Cellular Telephone Co.*, 897 F.2d 1164 (D.C. Cir. 1990) (the court held that the agency failed to articulate any standard for granting a waiver of the financial qualifications requirements) since Skytel's unique circumstances, as they have been described in this Order, render application of the rule contrary to the public interest. Moreover, these factors which favor granting Skytel's waiver, will not preclude us from acting on waivers of other parties, as long as they can demonstrate they will not cause interference to co-channel stations in proximity to their systems.

V. CONCLUSIONS

18. We propose to allow carriers to operate paging transmitters in the 931 MHz band with an ERP not exceeding 3500 watts, but without the current requirement that such transmitters be surrounded by existing co-channel transmitters of the same licensee, consistent with the proposed rule provisions described in this Notice. We believe that these proposed rule changes (*see* Appendix B, *infra)* would promote more effective use of the 931 MHz band. We request comments on the issues and proposals addressed in this Notice. We also find it in the public interest to waive our rules to allow Skytel to operate on 931.4375 MHz, which augments its nationwide operations, at higher ERP.

VI. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED THAT pursuant to Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), this Notice of Proposed Rule Making IS ISSUED.

20. IT IS FURTHER ORDERED THAT the Secretary shall cause a copy of this Notice to be sent to the Chief Counsel for Advocacy of the Small Business Administration.

21. IT IS FURTHER ORDERED THAT the waiver petition filed by Skytel Corporation IS GRANTED to the extent described herein and in paragraph 16, *supra.* Skytel Corporation can operate frequency 931.4375 MHz in accordance with Sections 22.502(c), 22.503(d), and 22.504(b)(2). We hereby waive Sections 22.505(c)(2), 22.506(e), and 22.506(f)(2) of the Commission's Rules for such purpose.

22. IT IS FURTHER ORDERED THAT the waiver petition filed by American Paging Inc. IS DENIED.

23. For further information contact Carmen A.C. Borkowski, at (202) 632-6450, Mobile Services Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, as long as they are disclosed as provided in the Commission's Rules. *See generally* 47 CFR §§ 1.1202, 1.1203, and 1.1206(a).

Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before **June 17, 1993** and reply comments on or before **July 2, 1993**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

Reasons for Action

This rule making proceeding is initiated to obtain comment regarding changes in the power limit rules for Public Land Mobile paging stations operated in the 931 MHz band.

Objectives

The proposed rules will enhance the efficiency of operations because fewer transmitters would be needed to cover the same geographic area. In addition, building penetration will be increased.

Legal Basis

The proposed action is authorized under sections 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303(r).

Reporting, Recordkeeping and Other Compliance Requirements

None.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

A rule change in this proceeding would benefit providers of paging services in the 931 MHz frequency band, by reducing costs. A number of these providers are small entities.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

We have determined no specific alternatives that would allow for high power operation of paging stations in the 931 MHz frequency band.

APPENDIX B

Proposed Rules

Title 47 of the Code of Federal Regulations, Part 22, is amended as follows:

Part 22 - Public mobile service

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

2. Section 22.505 is amended by removing and reserving paragraphs (b) (including table) and (c)(2):

Section 22.505 Antenna height-power limit.

* * * * *

(b) [Reserved]

(c) * * *

(2) [Reserved]

* * * * *

3. Section 22.506 is amended by removing and reserving paragraph (f)(2) and revising paragraph (e) to read as follows:

Section 22.506 Power.

* * * * *

(e) *931-932 MHz Band.* Base stations in the 931-932 MHz band must not exceed 3500 watts effective radiated power.

(f) * * *

(2) [Reserved]

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-260

In the Matter of

Amendment of Rules to Eliminate
Grandfathering Provisions
Applicable to Licensees on MAS
Frequencies

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 1993; Released: April 23, 1993

By the Commission:

I. INTRODUCTION

1. Before us are petitions for reconsideration of the *Report and Order* in PR Docket 90-260.[1] In that decision we, *inter alia*, eliminated grandfathering provisions for multiple address stations ("MAS") licensed after January 1, 1981, and on or before May 11, 1988, operating on bandwidths of 25 kHz or more. In eliminating these grandfathering provisions, we decided that, beginning on June 1, 1996, we would require these formerly grandfathered stations to bring their operations into conformance with the standard 12.5 kHz bandwidth prescribed by Section 94.65(a)(1) of the Rules unless justification for a wider bandwidth could be demonstrated with submission of the license renewal. Upon reconsideration, as explained more fully below, we are reinstating the grandfathering provisions for these stations.

II. BACKGROUND

2. This proceeding was initiated by a *Notice of Proposed Rule Making*, 5 FCC Rcd 3079 (1990) (*"Notice"*), which addressed a series of grandfathering provisions permitting MAS systems to operate with various and non-conforming technical standards. One of these provisions "indefinitely" grandfathered MAS systems licensed after January 1, 1981, and on or before May 11, 1988, operating on bandwidths of 25 kHz or more.[2] However, the *Notice* additionally requested comments on whether the Commission should review, for instance, as part of the stations' next license renewal, the spectrum requirements of these existing licensees in light of the current 12.5 kHz channeling plan.[3]

3. In the *Report and Order*, PR Docket 90-260, 6 FCC Rcd 3721 (1991), we eliminated the grandfathering provisions for MAS licensees originally licensed after January 1, 1981, and on or before May 11, 1988, using 25 kHz or more of bandwidth.[4] The *Report and Order* determined that MAS stations licensed during this seven and one-half year period would be subject to the current 12.5 kHz bandwidth requirement beginning on June 1, 1996.[5] Under the new "spectrum review program" adopted in the *Report and Order*, beginning on June 1, 1996, MAS licensees would be granted 12.5 kHz at the time of renewal. Any MAS licensee requesting spectrum in excess of 12.5 kHz would be required to justify their need for a greater bandwidth concurrent with the submission of the first license renewal after June 1, 1996.[6] The *Report and Order* noted that there are no specific criteria for justifying wider bandwidth and that the burden would be on the applicant to provide a sufficient showing of need supporting additional bandwidth. However, the *Report and Order* provided a list of relevant factors and noted that the Commission's analysis would consider all characteristics set forth in each justification on a case-by-case basis.[7] MAS licensees who successfully justify their need for additional bandwidth would receive licenses at that requested bandwidth. MAS licensees who fail to justify the excess bandwidth would be issued a modified license with the standard 12.5 kHz bandwidth.

4. Petitions for Reconsideration of our *Report and Order* were filed by Radscan, Inc. ("Radscan"), and the Utilities Telecommunications Council ("UTC"). Responsive pleadings were filed by the American Petroleum Institute ("API"), UTC and Radscan.[8] Radscan urges reconsideration of the decision to abolish grandfathering provisions for MAS stations licensed on or before May 11, 1988, using 25 kHz bandwidths and urges the Commission to reinstate this provision.[9] It argues that, in violation of the Administrative Procedure Act (APA), the Commission provided no notice that it might modify the 25 kHz grandfathering rule and that, consequently, Radscan and other interested parties did not have an adequate opportunity to provide meaningful comment prior to the rule change.[10] Radscan adds that, although the Commission asked for comment on whether

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[1] 6 FCC Rcd 3721 (1991).

[2] 5 FCC Rcd at 3079-80. This action was taken in the *Report and Order*, PR Docket 87-5, 3 FCC Rcd 1564 (1988) (*"1988 Report and Order"*), where the Commission completed a comprehensive review of the regulations and policies governing 900 MHz MAS systems. The *1988 Report and Order* reduced the standard bandwidth for MAS channels from 25 kHz to 12.5 kHz, with applicants being able to receive up to a maximum of 50 kHz of bandwidth on a case-by-case showing of need. 3 FCC Rcd at 1565. The *Report and Order*, SS Docket No. 79-10, 48 RR 2d 1183 (*"1981 Report and Order"*), previously had established a standard bandwidth of 25 kHz, with additional bandwidth, up to a maximum of 50 kHz, available upon an adequate showing of need. 1981 *Report and Order* at para 10.

[3] 5 FCC Rcd at 3080.

[4] 6 FCC Rcd at 3723.

[5] *Id.*

[6] The Commission determined that a "transition plan" submitted by UTC in its comments was a "basic design" for requiring a spectrum review transition program to 12.5 kHz by those grandfathered MAS systems operating at 25-50 kHz bandwidths. *Id.*

[7] Relevant information for justifying additional bandwidth could include the required data rate, the minimum polling interval for remotes, the anticipated number of remotes, the polling cycle for the master station, a description of the types of data to the transmitted, a breakdown of overhead time and actual transmission time, and any other information (including terrain) that justifies the request. *Id.*

[8] In addition, 14 petitions for waiver of the 12.5 kHz bandwidth requirement were filed by Radscan and others who wish to continue to operate on 25 kHz bandwidth.

[9] Radscan Petition for Reconsideration at ii.

[10] *Id.* at 6-7.

it should "review the spectrum requirements of existing licensees . . . as part of the stations' next license renewal," the Commission never suggested that such spectrum review would lead to a modification of the 25 kHz grandfathering rule at that time since, in fact, the Commission stated in the *Notice* that it did not propose to modify the 25 kHz grandfathering provisions.[11] Radscan adds that the Commission also failed to provide a reasoned explanation, supported by record evidence, for abruptly changing a policy that recently "indefinitely" grandfathered 25 kHz bandwidth MAS stations.[12]

5. Radscan adds that the Commission's reliance on UTC's "transition plan," contained in its comments to the *Notice*, was misplaced because the plan was submitted only in case other parties filed comments urging the elimination of the 25 kHz grandfathering rule. Since no such comments were filed, UTC subsequently retracted its plan, noting that the comments in this proceeding did not indicate that the Commission should consider any sort of spectrum review procedure at this time.[13]

6. UTC's petition for partial reconsideration characterizes the decision to eliminate the grandfathering provisions for 25-50 kHz MAS stations licensed between January 1, 1981, and May 11, 1988, and to institute a spectrum review plan for these stations as an "extreme step."[14] However, given this decision, UTC requests implementation of its alternative plan in lieu of the Commission's plan.[15]

III. DISCUSSION

7. We are rescinding the rule adopted in the *Report and Order* requiring MAS stations licensed after January 1, 1981, and on or before May 11, 1988, and operating on 25-50 kHz bandwidth to justify the need for greater than 12.5 kHz bandwidth at the first license renewal after June 1, 1996. API, UPI and Radscan discussed with some particularity adverse effects that would result if MAS licensees were unable adequately to justify their continued use of 25-50 kHz bandwidth systems. They point out that these systems are operating efficiently on their current bandwidth assignments and that the disruption that would result from compliance with these new rules would be detrimental to the economic viability of industries that employ MAS systems.[16] We also recognize that the uncertainty for many MAS licensees over whether their justifications will be accepted could adversely affect their long-term business operations (*e.g.*, expansion plans, outside investments, etc.). Finally, we believe that eliminating the spectrum justification requirement and retaining the grandfathering provisions will serve the public interest by relieving licensees currently operating efficiently on their 25-50 kHz bandwidth allocations of an unnecessary regulatory burden.

IV. CONCLUSION

8. On reconsidering the *Report and Order*, PR Docket 90-260, 6 FCC Rcd 3721 (1991), we are rescinding the rule adopted in the *Report and Order* requiring MAS stations licensed after January 1, 1981, and on or before May 11, 1988, and operating on 25-50 kHz bandwidth, to conform to a spectrum review plan to justify the need for greater than 12.5 kHz bandwidth at the time of their first license renewal after June 1, 1996. These stations will therefore continue to retain their grandfathered status as proposed in the *Notice of Proposed Rule Making*. We believe this decision is consistent with policies we articulated in the *1988 Report and Order* when we initially grandfathered these stations.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

9. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need and Purpose of the Action

10. This *Memorandum Opinion and Order* retains the rules that "grandfather" stations licensed after January 1, 1981, and on or before May 11, 1988, operating on bandwidths of 25 kHz or more. This action provides effective and adaptive regulation for communications, while lessening the impact on licensees' investment in new equipment.

Issues Raised in Response to the Initial Regulatory Flexibility Analysis

11. There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

Significant Alternatives Considered and Rejected

12. The initial *Report and Order* adopted a spectrum review plan for MAS stations licensed between January 1, 1981, and May 11, 1988, and operating between 25-50 kHz

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[11] *Id.* at 7 n.5.

[12] *Id.* at 15-16. API concurs with these arguments and argues that the Commission should correct the APA procedural defect and issue a new *Notice* that would require 25 kHz licensees to convert to 12.5 kHz bandwidth effective with the first renewal period after the year 2000, but only in those areas of the country where MAS channels at 928/952-60 are congested, such as Houston, Texas. API Comments at i, 7-8.

[13] Radscan Petition for Reconsideration at 7-8.

[14] UTC Petition for Partial Reconsideration at 6.

[15] UTC's plan proposes that for renewal applications submitted after January 1, 2000, each licensee would submit with its license renewal application a statement of bandwidth use and one of the following: (1) certification that by the date of the last license renewal submission, the system will operate on 12.5 kHz bandwidth; (2) justification of need for greater than 12.5 kHz bandwidth; (3) a statement that the system cannot justify the use of 12.5 kHz bandwidth, accompanied by a request for continued authorization on greater than 12.5 kHz bandwidth until a specified date, by which the existing equipment will be fully amortized; or (4) a showing of channel availability in the area, and a request for authority to continue operations on greater than 12.5 kHz bandwidth on the basis of non-congestion. UTC Reply at 2-3.

[16] API maintains that depending on the number of remotes operating, the cost of converting a single system to 12.5 kHz could be in the range of $200,000 to $400,000. API Comments at 6 n.7. UTC states that the physical changeout of a MAS system is complicated, involving the ordering and budgeting of replacement equipment; arranging to have the existing equipment removed, shipped to a manufacturer, altered and reinstalled; and leasing telecommunications lines to replace the old radio equipment during new equipment installation. UTC Petition for Partial Reconsideration at 6-7. Radscan adds that, as a security alarm company, it cannot take its systems off line for even a short period of time without jeopardizing life and property. Radscan Reply at 4.

bandwidth. The spectrum review plan would have required these stations to convert to 12.5 kHz bandwidth operations during their first license renewal after June 1, 1996, unless justification for use of a wider bandwidth was made concurrent with the license application and approved. On reconsideration, we return to the proposal made in the *Notice of Proposed Rule Making* to continue to grandfather these stations at their current bandwidth.

VI. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), Part 94.65(a)(1) of the Commission's Rules, 47 C.F.R. Part 94.65(a)(1), IS AMENDED as set forth in the Appendix below, effective [thirty days after publication in the Federal Register].

14. IT IS FURTHER ORDERED that the petitions for justification for continued use of 25 kHz MAS channels, *see* n.8 *supra*, filed by Alarm Center Inc., Alarm Monitoring Cooperative, Inc., The Alert Centre, Armor Systems, Inc., Atlantic Coast Alarm Inc., Bay Alarm, Bolt Security Systems, Certified Security Systems, Inc., George Alarm Company, Inc., Hawkeye Security Systems, Inc., Midwestern Alarms, Racal-Chubb Security Systems Inc., Radscan, Inc., and Westec Security Inc. ARE DISMISSED as MOOT.

15. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

16. For further information concerning this *Memorandum Opinion and Order*, contact Tatsu Kondo, Land Mobile and Microwave Division, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 94 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 94 - Private operational-fixed microwave service

1. The authority citation continues to read as follows:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. §§ 154, 303, unless otherwise noted.

2. 47 C.F.R. § 94.65 is amended by revising paragraph (a)(1) to read as follows:

§ 94.65 Frequencies

* * * * *

(a) * * *

(1) *Multiple Address System frequencies.* Multiple address system (MAS) frequencies are available for the point-to-multipoint transmission of a licensee's products or services, excluding video entertainment material, to a licensee's customer or for its own internal communications. The paired frequencies listed in this section shall be used for two-way interrogate/response communications between a master station and remote stations. Each master station operating on these frequencies is required to serve a minimum of four separate active remote stations. Ancillary one-way communications on paired frequencies are permitted on a case-by-case basis. Ancillary communications between interrelated master stations are permitted on a secondary basis. The normal channel bandwidth assigned will be 12.5 kHz. Upon adequate justification, however, channels with bandwidths up to 50 kHz may be authorized. Tables 2, 4, and 6 list frequencies with 25 kHz bandwidth channels. When licensed for a larger bandwidth, the system still is required to use equipment which meets the $\pm$ 0.00015 percent tolerance requirement. (*See* § 94.67). Systems licensed for frequencies in these MAS bands prior to August 1, 1975, may continue to operate as authorized until June 11, 1996, at which time they must comply with current MAS operations based on the 12.5 kHz channelization set forth in this paragraph. Systems licensed between August 1, 1975, and January 1, 1981, inclusive, were permitted to operate as authorized until January 1, 1991, at which time they were required to comply with the grandfathered 25 kHz standard bandwidth and channelization requirements set forth in this paragraph. Systems originally licensed after January 1, 1981, and on or before May 11, 1988, with bandwidths of 25 kHz and above, will be grandfathered indefinitely.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-315

In the Matter of

Amendment of Section 73.202(b), RM-8141
Table of Allotments,
FM Broadcast Stations.
(Starbuck, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 31, 1993; Released: April 23, 1993

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 464 (1993), issued in response to a petition filed by Starbuck Broadcasters ("petitioner"). The *Notice* proposed the allotment of Channel 247C2 to Starbuck, Minnesota, as that community's first local broadcast service. Petitioner filed comments reaffirming its interest in the allotment of Channel 247C2 at Starbuck. No other comments were received.

2. We believe the public interest would be served by allotting Channel 247C2 to Starbuck, Minnesota, as it will provide the community with its first local broadcast service. Channel 247C2 can be allotted to Starbuck consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 6.7 kilometers (4.2 miles) southwest of the community.[1] The site restriction will prevent a short spacing to Station KDKK, Channel 248C1, Park Rapids, Minnesota.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Starbuck, Minnesota	247C2

4. The window period for filing applications for Channel 247C2 at Starbuck will open on **June 8, 1993,** and close on **July 8, 1993**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 247C2 at Starbuck are 45-33-44 and 95-34-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-111

In the Matter of

Amendment of Section 73.202(b), RM-8204
Table of Allotments,
FM Broadcast Stations.
(Reedsport, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 5, 1993; Released: April 26, 1993

Comment Date: June 14, 1993
Reply Comment Date: June 29, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Colleen E. and Rodney B. Fafara ("petitioners") requesting the substitution of Channel 258C3 for Channel 258A at Reedsport, Oregon, and the modification of Station KRBZ's construction permit to specify operation on the higher class channel. Petitioners state that they will apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 258C3 for Channel 258A at Reedsport since it could provide the community with a wide coverage area service. Channel 258C3 can be allotted to Reedsport in compliance with the Commission's Rules with a site restriction of 2.5 kilometers (1.6 miles) south to accommodate petitioner's desired transmitter site.[2] As requested, we also propose to modify petitioners' construction permit for Station KRBZ to specify the higher class channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Reedsport or require the petitioners to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Reedsport, Oregon	221A, 258A	221A, 258C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 14, 1993,** and reply comments on or before **June 29, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Colleen E. Fafara
Rodney B. Fafara
825 E. Evelyn Avenue #532
Sunnyvale, California 94086
(Petitioners)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

[1] Although petitioners' request was signed, they failed to include an affidavit verifying that the statements contained in their petition were accurate to the best of their knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.420(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes,* 5 FCC Rcd 3911, n.41 (1990). Petitioners are requested to rectify this omission in their comments.

[2] The coordinates for Channel 258C3 at Reedsport are North Latitude 43-40-40 and West Longitude 124-06-36.

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-112

In the Matter of

Amendment of Section 73.202(b), RM-8210
Table of Allotments,
FM Broadcast Stations.
(Buckeye, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 5, 1993; Released: April 26, 1993

Comment Date: June 14, 1993
Reply Comment Date: June 29, 1993

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Mobley Broadcasting, Inc. ("petitioner"), licensee of Station KMJK(FM), Channel 295A, Buckeye, Arizona, seeking the substitution of Channel 295C2 for Channel 295A and modification of its license accordingly to specify operation on the higher powered channel. Petitioner stated its intention to apply for Channel 295C2 if allotted to Buckeye, as requested.

2. We believe the public interest would be served by proposing the substitution of Channel 295C2 for Channel 295A at Buckeye since it could provide an expanded coverage area FM service to the community. Channel 295C2 can be allotted to Buckeye at the petitioner's specified site, located 27.2 kilometers (16.9 miles) west of the community,[1] in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules. However, as Buckeye is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican government to the proposal.

3. The petitioner's modification request at Buckeye conforms with the provisions of Section 1.420(g) of the Commission's Rules. Therefore, we shall propose to modify the license of Station KMJK(FM) without entertaining competing expressions of interest in the use of Channel 295C2 at Buckeye, or requiring the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. In view of the above, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Buckeye, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Buckeye, Arizona	295A	295C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 14, 1993,** and reply comments on or before **June 29, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Philip L. Malet, Esq.
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Coordinates at the petitioner's specified site for requested Channel 295C2 at Buckeye are 33-21-03 and 112-52-41. Consideration of this proposal, and termination of this proceeding, is conditioned upon the adoption of a working arrangement between the United States and Mexican governments to implement the 1992 U.S./Mexico FM Broadcast Agreement.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-228

In the Matter of

Amendment of Section 73.202(b),	RM-8079
Table of Allotments,	RM-8149
FM Broadcast Stations.	
(Allouez and Sheboygan Falls, Wisconsin)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 31, 1993; Released: April 26, 1993

By the Chief, Allocations Branch:

1. In response to a petition filed by Michael R. Walton ("Walton"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 6527 (1992), seeking the allotment of Channel 294C3 to Allouez, Wisconsin, as that community's first local broadcast service. Petitioner filed comments supporting the allotment at Allouez. Julian Jetzer d/b/a Sheboygan Falls Broadcasting ("SFB") filed a counterproposal,[2] as did Wheeler Broadcasting, Inc. ("Wheeler") and Midwest Dimensions, Inc. ("Midwest").[3] SFB and Walton filed reply comments.

2. SFB counterproposed the allotment of Channel 294A to Sheboygan Falls, Wisconsin, as that community's first local service. In support of its request, SFB states that Sheboygan Falls is an incorporated community with a population of 5,800, deserving of its first local broadcast service. Further, Sheboygan Falls has a full-time police and fire department, its own school system and weekly news-

[1] The community of Sheboygan Falls has been added to the caption.

[2] Public Notice of the counterproposal was given on December 29, 1992, Report No. 1922 (RM-8149).

[3] Wheeler, licensee of Station WOWN, Channel 257C3, Shawano, Wisconsin, and Midwest, licensee of Station WPKR, Channel 258C2, Waupun, Wisconsin, jointly filed a counterproposal. Wheeler and Midwest's counterproposal included requests for channel substitutions at Shawano, Wisconsin, Oconto, Wisconsin and Escanaba, Michigan. They also requested that the proposed allotment at Allouez, Wisconsin be denied. According to Wheeler and Midwest, Allouez is a suburb of Green Bay, Wisconsin, and instead of providing a first local service, the allotment would add an additional channel to an area that is adquately served by FM and AM radio stations. Wheeler and Midwest stated that Station WOWN, Shawano, on Channel 257C3, is short spaced to Stations WNBZ, Frankfort, Michigan, and WPRK, Waupon, Wisconsin. To eliminate these short spacings, they requested the substitution of Channel 246A for Channel 296A at Oconto, Wisconsin, and modification of the license for Station WOCO-FM, Oconto, accordingly. Further, they propose to substitute Channel 245C for Channel 246C at Escanaba, Michigan, and to modify the license for Station WGLQ, Escanaba, to accommodate Channel 246A at Oconto.

Wheeler and Midwest's counterproposal has not been put on public notice as it is unacceptable for consideration for the following reasons. First, since Stations WOCO-FM, Oconto, and WGLQ, Escanaba, must change channels, they are entitled to reimbursement for the reasonable costs in changing frequencies. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Wheeler and Midwest failed to make a reimbursement commitment in the counterproposal. Second, the allotment of Channel 246A at Oconto would require a site different from the licensed site for Station WOCO-FM, Oconto, and Wheeler and Midwest failed to include a statement from the Station WOCO-FM licensee indicating its consent to a site change. Third, the new site for Station WOCO-FM, Channel 246A, Oconto, is short spaced to Channel 245C at Escanaba which would require that Station WGLQ change transmitter site. It is Commission policy not to require a station to relocate its transmitter site involuntarily to accommodate a change in another community. *See North Charleston, South Carolina*, 47 FR 10560, March 11, 1982. Furthermore, Wheeler and Midwest's proposal for Channel 245C at Escanaba is short spaced to an application for Channel 244C3 at Algoma, Wisconsin (File No. BPH-920624IC), by 3.8 kilometers (2.4 miles). The application at Algoma is entitled to cut-off protection. *See Conflicts between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. pending*. Although Wheeler and Midwest stated that the licensee of Station WBDK, Algoma has "agreed in principle" to relocate its transmitter, they did not include a consent agreement with the counterproposal. Fourth, Wheeler and Midwest failed to include an affidavit verifying that the statements contained in the proposals were accurate to the best of the counterproponents' knowledge. Section 1.52 of the Commission's Rules states that the original of any document filed with the Commission by a party not represented by counsel shall be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). These rules are strictly enforced in allotment rule making proceedings. Since the counterproposal fails to comply with our standard that counterproposals must be technically and procedurally correct at the time of their filing, *see Fort Bragg, California*, 6 FCC Rcd 5817 (1991); *Broken Arrow and Bixby, Oklahoma and Coffeeville, Kansas*, 3 FCC Rcd 6507 (1988), *recon. denied* 4 FCC Rcd 6981 (1989), we will dismiss the counterproposal filed by Wheeler and Midwest. No further consideration of the comments filed in response to the counterproposal will be considered.

paper and has a substantial business district. SFB indicated its intention to file an application for the channel at Sheboygan Falls.

3. In reply comments, Walton and SFB restated their positions. Walton restated his support of the allotment of Channel 294C3 at Allouez, Wisconsin. In response to the counterproposal filed by SFB, Walton argued that his proposal should be adopted because it will provide service to a greater area and population than would be achieved by a Class A allotment at Sheboygan Falls. According to Walton, a Class C3 channel at Allouez, which has a population of 14,431 people, will cover 4,782 square kilometers, reaching a total population of 279,360, while a Class A channel at Sheboygan Falls, which has a population of 5,823, will cover 2,515 square kilometers and reach a total population of 112,151. SFB restated its support of a channel in Sheboygan Falls and indicated its intention to file an application for Channel 294A if allotted to the community.

4. After consideration of the information filed in this proceeding, we believe the public interest would be served by the allotment of Channel 294C3 at Allouez, Wisconsin, and Channel 293A in lieu of Channel 294A at Sheboygan Falls, Wisconsin, as each community's first local broadcast service. Channel 294C3 can be allotted to Allouez consistent with the Commission's spacing requirements provided there is a site restriction 7.2 kilometers (4.4 miles) north of the community.[4] The site restriction will prevent a short spacing to Channel 293C1, Station WLJY, Marshfield, Wisconsin, and to the construction permit for Channel 240C3, Station WJLW, De Pere, Wisconsin. Channel 294C3 at Allouez is short spaced to Channel 240A, De Pere, Wisconsin. However, Channel 240C3 has been substituted for Channel 240A at De Pere in MM Docket No. 89-292, 6 FCC Rcd 2624 (1991). The grant of a license for Allouez may be withheld until Station WJLW is licensed on the new channel. A staff engineering analysis has determined that Channel 293A can be allotted to Sheboygan Falls in compliance with the separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 7.9 kilometers (4.9 miles) east of the community.[5] The site restriction will prevent a short spacing to Station WLJY, Channel 293C1, Marshfield, Wisconsin.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Allouez, Wisconsin	294C3
Sheboygan Falls, Wisconsin	293A

6. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Ray L. Wheeler,
Chairman
Wheeler Broadcasting, Inc.
1456 E. Green Bay Street
Shawano, Wisconsin 54166

James R. Coursolle,
President
Midwest Dimensions, Inc.
P.O. Box 3450
Oshkosh, Wisconsin 54903

American Communications
Company
Station WJLW
133 N. Superior Street
De Pere, Wisconsin 54115

7. The window period for filing applications for Channel 294C3 at Allouez, Wisconsin, and Channel 293A at Sheboygan Falls, Wisconsin, will open on **June 8, 1993,** and close on **July 8, 1993**.

8. IT IS FURTHER ORDERED, That the counterproposal filed by Wheeler Broadcasting, Inc. and Midwest Dimensions, Inc. IS DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] The coordinates for Channel 294C3 at Allouez are 44-30-50 and 88-02-57.
[5] The coordinates for Channel 293A at Sheboygan Falls are 43-42-44 and 87-42-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-101

In the Matter of

Amendment of Section 73.202(b), RM-8201
Table of Allotments,
FM Broadcast Stations.
(Pelham, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 30, 1993; Released: April 26, 1993

Comment Date: June 14, 1993
Reply Comment Date: June 29, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Mitchell County Television ("petitioner") requesting the allotment of Channel 222A to Pelham, Georgia, as that community's first local FM service.[1] Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 222A at Pelham, Georgia, since it could provide the community with its first local FM service. Channel 222A can be allotted to Pelham in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.8 kilometers (1.8 miles) south[2] in order to avoid a short-spacing to Station WAZE(FM), Channel 221A, Dawson, Georgia, and Station WDDQ(FM), Channel 221, Adel, Georgia.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Pelham, Georgia	--	222A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 14, 1993,** and reply comments on or before **June 29, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jerry E. White
Mitchell County Television
Route 3, Box 514
Pelham, Georgia 31779
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] We note that the petition was signed, as required by the Commission's rules. However, petitioner failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.420(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 222A at Pelham are North Latitude 31-06-07 and West Longitude 84-08-44.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-103

In the Matter of

Amendment of Section 73.202(b), RM-8206
Table of Allotments,
FM Broadcast Stations.
(Minetto, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 1, 1993; Released: April 26, 1993

Comment Date: June 14, 1993
Reply Comment Date: June 29, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Francis G. Toce ("petitioner") requesting the allotment of Channel 293A to Minetto, New York, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 293A to Minetto, New York, since it could provide the community with its first local FM service. Channel 293A can be allotted to Minetto in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.6 kilometers (1.6 miles) northwest to avoid a short-spacing to Station WPCX, Channel 295B, Auburn, New York.[1] The proposed allotment is short-spaced to unoccupied and unapplied-for Channel 293A at Brockville, Ontario, Canada. However, we believe that no objectionable interference to the Canadian station will occur because the protected contour of a Brockville station and the interference contour of the Minetto station do not overlap. Concurrence by the Canadian government in the allotment, as a specially negotiated allotment, has been requested since Minetto is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Minetto, New York	--	293A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 14, 1993,** and reply comments on or before **June 29, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James L. Oyster, Esq.
Rt. 1, Box 203A
Castleton, Virginia 22716
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 293A at Minetto are North Latitude 43-25-18 and West Longitude 76-28-54.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-104

In the Matter of

Amendment of Section 73.202(b), RM-8209
Table of Allotments,
FM Broadcast Stations.
(Greenwood, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 1, 1993; Released: April 26, 1993

Comment Date: June 14, 1993
Reply Comment Date: June 29, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Team Broadcasting Co., Inc. ("petitioner"), requesting the substitution of Channel 282C2 for Channel 282C3 at Greenwood, Mississippi. Petitioner also requests modification of its construction permit for Station WGNL(FM), Channel 282C3, to specify operation on Channel 282C2.[1] Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 282C2 can be allotted to Greenwood, Mississippi, consistent with the Commission's spacing requirements, at a site specified by the petitioner.[2] Channel 282C2 is short spaced to Channel 282A, Station WUMI, State College, Mississippi. However, the construction permit for Station WUMI, Channel 282A, was modified in MM Docket No. 92-179 to specify operation on Channel 283C3. Station WUMI has a construction permit for Channel 283C3 that is fully spaced to Channel 282C2 at Greenwood. Therefore, a grant of a license for Station WGNL(FM) at Greenwood may be withheld until Station WUMI is licensed on the new channel. We shall propose to modify the construction permit for Station WGNL(FM), Channel 282C3, to specify operation on Channel 282C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, we believe it would serve the public interest to seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Greenwood, Mississippi, as reflected below:

	Channel No.	
City	Present	Proposed
Greenwood, Mississippi	230A, 256C, 282C3	230A, 256C, 282C2

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

PDB Corporation, State College
Station WUMI
5880 Ridgewood Road, D-40
Jackson, Mississippi 39211

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 14, 1993,** and reply comments on or before **June 29, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Mark N. Lipp
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, Suite 500
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be

[1] The construction permit for Station WGNL(FM), Channel 282A, was modified in MM Docket 89-368 to specify operation on Channel 282C3. *See* 5 FCC Rcd 4681 (1990).
[2] The coordinates for Channel 282C2 at Greenwood are 33-28-50 and 90-09-35.

served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-252

In the Matter of

Amendment of Section 73.202(b), RM-8099
Table of Allotments,
FM Broadcast Stations.
(Leesburg and Tavares, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 6, 1993; Released: April 26, 1993

By the Chief, Allocations Branch:

1. At the request of J. J. Taylor Companies, Inc. ("Taylor"), licensee of Station WXXL(FM), Channel 294C1, Leesburg, Florida, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7570 (1992), proposing the reallotment of Channel 294C1 from Leesburg, Florida to Tavares, Florida, as that community's first local service. Petitioner also requests the modification of its license for Station WXXL(FM) to specify Tavares, Florida, as its community of license. Taylor and Women in Florida Broadcasting, Inc. ("Women"), licensee of Station WDFL(FM), Channel 295C1, Cross City, Florida, filed comments. Taylor filed reply comments.

2. In comments Taylor notes that the proposed reference point for Tavares is short-spaced to a pending application (File No. BPH-891129IB) for Station WDFL(FM).[1] However, Taylor states that the Tavares reference point is the presently licensed site of Station WXXL(FM), and the Cross City application specifies facilities pursuant to Section 73.215 consistent with Station WXXL's operation at its proposed site with full Class C1 facilities. Taylor restates its intention to apply for Channel 294C1 at Tavares, if allotted.

3. Women filed comments proposing a change in the reference coordinates at Tavares. Noting that the coordinates proposed in the *Notice* (28-33-31 and 81-35-38), conflict with its pending application for Station WDFL(FM), Women proposes the use of alternate coordinates (28-31-08 and 81-25-11) at Tavares to eliminate the short-spacing.

4. In reply comments, Taylor states that since it has proposed no change affecting station separations, the fact that the reference point for Tavares is short-spaced to Station WDFL(FM)'s application should be irrelevant. Taylor maintains that its proposal retains the status quo with respect to all station separations, while still satisfying all technical requirements with respect to its proposed new community of license. Taylor notes that Women has proposed to resolve the problem of the allotment short-spacing by specifying different reference coordinates for Tavares. Taylor believes a better approach would be to allow allotment changes that do not change required separations and do not degrade existing separations. Taylor argues that any other result would severely infringe on the flexibility of stations to seek facility changes. Taylor urges the Commission to act on its initial proposal as filed. However, Taylor states that it is willing to accept the revised reference coordinates only if it will expedite action on both proposals and will not require that an application to effectuate the change in its community of license at Station WXXL's present licensed site be processed under Section 73.215.

5. We deny Women's proposal to change the reference coordinates of an authorized transmitter site to eliminate a conflict with its application. We note that Women's application was filed prior to the effective date of *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 7 FCC 4917 (1992), *recon. pend.* As such, we will follow established Commission policy, which states that rule making proposals which provide new service benefits are generally preferred over an application which represents a preference for a particular site. *See Andalusia, Alabama*, 49 FR 32201, published August 13, 1984, and *Rocky Mount, N.C.*, 6 FCC Rcd 2153 (1991). Women has presented no evidence as to why its site preference should be protected.

6. Based on the information before us, we believe the public interest would be served by reallotting FM Channel 294C1 from Leesburg to Tavares, Florida, at Station WXXL(FM)'s currently authorized transmitter site. Taylor has shown that the reallotment will result in a preferential arrangement of allotments. Tavares (population 7,383) would receive its first local transmission service, and Leesburg (population 14,903) will continue to receive local aural transmission service from Stations WLBE(AM) and WQBQ(AM).[2] Neither Leesburg nor Tavares is located in an urbanized area.

7. Channel 294C1 can be allotted to Tavares at the petitioner's current transmitter site in compliance with the minimum distance separation requirements with a site restriction 30.1 kilometers (18.7 miles) southeast of the community.[3] In accordance with Section 1.420(i) of the Commission's Rules, we will modify the license for Station WXXL(FM) to specify Tavares, Florida, as its community of license.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 7, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

[1] As stated in the *Notice*, the Commission is currently considering a proposal to change the community of license for Station WDFL(FM), Channel 295C1, from Cross City to Bronson, Florida. *See* 7 FCC Rcd 5941 (1992).

[2] Population figures are taken from the 1990 U.S. Census.

[3] The coordinates for Channel 294C1 at Tavares are North Latitude 28-33-31 and West Longitude 81-35-38.

City	Channel No.
Leesburg, Florida	--
Tavares, Florida	294C1

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WXXL(FM), Channel 294C1, Leesburg, Florida, IS MODIFIED, to specify Tavares, Florida, as its community of license in lieu of Leesburg, Florida, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, J. J. Taylor Companies, Inc., licensee of Station WXXL(FM) is required to submit a rule making fee in addition to the fee required for the application to effect the change of community of license.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Amendment of the Amateur Service Rules to Expand the Privileges of Novice and Technician Operators. RM-8093

ORDER

Adopted: April 16, 1993; Released: April 27, 1993

By the Chief, Private Radio Bureau:

1. On September 24, 1992, Mr. William G. Welsh filed a petition to amend the amateur service rules (RM-8093) to expand the privileges of Novice Class and certain Technician Class operators by making the frequencies 10.10-10.15 MHz, 30 meter (m) band, available to them.[1] Mr. Welsh argues that the 40, 15, and 10 m bands currently authorized to those operators are currently less useful than in the past due to sunspot cycles, fading, and interference from international shortwave broadcast stations. Further, he states that the longer antennas needed in the 80 m band limit its appeal to many Novice and Technician amateur operators.

2. In 1985, the Commission added the 30 m frequency band to the amateur service. In the *First Report and Order* in PR Docket No. 84-960, adopted April 25, 1985, 50 Fed. Reg. 18662 (1985), the Commission declined to make it available to Novice and Technician operators. In its action, the Commission said that an acceptable balance had been achieved between licensing incentives and operating privileges. A consistent policy was followed in a subsequent proceeding. In the *Report and Order* in PR Docket No. 88-467, adopted January 27, 1989, 4 FCC Rcd 1424 (1989), the Commission excluded Novice and Technician Class operators from the 17 m band because of its small size and because they had recently received enhanced privileges. *See Report and Order* in PR Docket No. 86-161, adopted January 28, 1987, 2 FCC Rcd 727 (1987). In sum, the petition for rule making is repetitive.

3. In view of the foregoing, and pursuant to Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e), rule making petition RM-8093, filed by William G. Welsh, to amend the amateur service rules IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[1] Currently, the 80, 40, 15, and 10 m high frequency (HF) bands are available to Novice Class operators, Technician Class operators holding a Certificate of Successful Completion of Examination (CSCE) indicating that element 1(A), 1(B), or 1(C) has been passed, and to Technician Class operators holding a license issued before February 14, 1991. *See* Section 97.301(e) of the Commission's Rules, 47 C.F.R. § 97.301(e).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 27, 1993

FCC REMINDS BRIDGE CRANE USERS OF WAIVER TERMINATION DATE

On November 16, 1989, the Commission granted a temporary waiver of Section 95.207 of the Commission's Rules, 47 C.F.R. § 95.207, to customers of Robinson Engineering Company allowing them to continue to engage in bridge crane operations on model surface craft and model aircraft channels for a limited time.

This Public Notice is issued to remind those users that the waiver ends on June 30, 1993. Any operation on those frequencies by such users after that date would be a violation of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO.
AT&T OF PUERTO RICO, INC.

File No. I-T-C-93-044

Application to acquire and make available facilities for service between Puerto Rico and the Dominican Republic.

ORDER AND AUTHORIZATION

Adopted: April 19, 1993; Released: April 27, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-044 IS GRANTED, and

a. American Telephone & Telegraph Co., (AT&T) is authorized to make available jointly, on an Indefeasible Right of User (IRU) basis, to AT&T of Puerto Rico, Inc. (AT&T-PR) and All America Cables and Radio, Inc.- Dominican Republic (AAC&R-DR), 24 MAUOs in Segments G1 and G2 of the Transcaribbean Cable System (TCS-1);

b. AT&T-PR is authorized to:

1. acquire by IRU from AT&T a one-half interest in the facilities specified in a. above; and

2. use these facilities to provide AT&T-PR's regularly authorized services between Puerto Rico and the Dominican Republic.[1]

3. Nothing in this order shall be construed as superseding any of the conditions set forth in any previous Commission Order dealing with the cable systems herein.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of this Order's public notice date (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] In its application AT&T-PR requests authority to acquire and operate facilities for the provision of common carrier services between Puerto Rico and the Dominican Republic and points beyond. We note that should AT&T-PR obtain any interest in facilities beyond the Dominican Republic for the purpose of providing common carrier services, including private line service, between Puerto Rico and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for AT&T-PR to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEGRAM CORPORATION — File No. I-T-C-93-052

Application for authority to operate as an international resale carrier.

ORDER AND AUTHORIZATION

Adopted: April 21, 1993; Released: April 27, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-052 IS GRANTED, and American Telegram Corp. (ATC), is authorized to provide international telegram service by means of facsimile service through the resale of the international switched voice services set forth in Sprint's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, Allnet's Tariff F.C.C. No. 5, Metromedia's Tariff F.C.C. No. 2, Worldcom's Tariff F.C.C. No. 1, TRT/FTC's Tariff F.C.C. No. 15 and International Telecom's Tariff F.C.C. No. 1 between the contiguous U.S. and the international points named in those tariffs, and to provide international telex and telegram service by the resale of the international telex and telegram service set forth in WUI's Tariff F.C.C. No. 5, TRT/FTC's Tariff F.C.C. No. 4, Graphnet's Tariffs F.C.C. Nos. 2 and 5, CCI's Tariff F.C.C. No. 5 and New Valley Communications Tariff F.C.C. No. 2 between the U.S. and overseas points listed in those tariffs.

3. IT IS FURTHER ORDERED that ATC shall obtain any necessary operating arrangements in each of the countries to which it provides service and shall file with the Commission any operating agreements with its correspondents within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the services ATC seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-93-053

Application for authority to reassign, acquire and operate facilities for service to Vietnam.

ORDER AND AUTHORIZATION

Adopted: April 21, 1993; Released: April 27, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-93-053 IS GRANTED, and AT&T is authorized to:

a. replace the 60 TAT-6 half-circuits[1] with its previously authorized one-half interest in 30 MAUOs in the TAT-8 cable system[2] for service to Vietnam;

b. acquire and operate one DCME terminal for the circuits in a. above; and

c. use said facilities to provide AT&T's regularly authorized services between the U.S. and Vietnam via an appropriate INTELSAT IOR Satellite.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

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[1] *See AT&T-Vietnam*, 7 FCC Rcd 2891 (1992).

[2] The MAUOs in the TAT-8 were previously authorized for AT&T's use with Belgium (20) and Yugoslavia (10). *See* TAT-8 Authorization, 98 FCC 2d 440 (1984). This capacity is currently jointly owned by AT&T and its correspondents in those countries. AT&T's correspondent, DGPT of Vietnam, will acquire the eastern half-MAUOs, on a lease basis, from those correspondents.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP.

Application for authority to acquire and operate facilities for direct service between the U.S. and Guyana.	File No. I-T-C-93-051
Application for authority to acquire and operate facilities for direct service between the U.S. and the Ivory Coast.	File No. I-T-C-93-055

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 21, 1993; Released: April 27, 1993

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Guyana and the U.S. and the Ivory Coast[1] by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File Nos. I-T-C-93-051 and I-T-C-93-055 ARE GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 33 voice-grade satellite half-circuits between the Andover, Maine earth station and an appropriate INTELSAT satellite in the Atlantic Ocean Region (AOR), connecting with similar half-circuits between the satellite and an earth station in Guyana furnished by MCI's correspondent in Guyana;

b. own and operate 33 voice-grade circuits in the Andover earth station to be used in conjuction with the space segment capacity;

c. own and operate 33 voice-grade connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center;

d. use the facilities in a, b and c above to provide MCI's regularly authorized services between the U.S. and Guyana;

e. lease from Comsat and operate 24 voice-grade satellite half-circuits between the Andover, Maine earth station and an appropriate INTELSAT satellite in the AOR, connecting with similar half-circuits between the satellite and an earth station in the Ivory Coast furnished by MCI's correspondent in the Ivory Coast;

f. own and operate 24 voice-grade circuits in the Andover earth station to be used in conjunction with the satellite space segment capacity;

g. own and operate 24 voice-grade connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center; and

h. use the facilities in e, f and g above to provide MCI's regularly authorized services between the U.S. and the Ivory Coast.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondents in Guyana and the Ivory Coast, and a copy of the agreements, including the applicable accounting rate, shall be filed with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in §43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and Guyana and the United States and the Ivory Coast -- that is, private lines which originate in the United States and terminate in either Guyana or the Ivory Coast or which originate in either Guyana or the Ivory Coast and terminate in the United States. In addition, MCI may not --and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the Guyana or the Ivory Coast end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the Guyana or the Ivory Coast afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *Order and Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992).

[1] In its applications MCI requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Guyana and the Ivory Coast and points beyond. We note that should MCI obtain any interest in facilities beyond Guyana and the Ivory Coast for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

6. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

Line of Site, Inc. File Nos. 7079-CM-P-83
and 7118-CM-P-83

For Authority to Construct
and Operate Multichannel Multipoint
Distribution Service stations
on the E-group channels at
Columbus, Georgia and Houma, Louisiana

ORDER ON RECONSIDERATION

Adopted: April 15, 1993; Released: April 27, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* Line of Site, Inc. (Line) filed petitions for reconsideration of the dismissals by the Domestic Facilities Division (Division) on delegated authority of its applications for authority to construct and operate Multichannel Multipoint Distribution Service (MMDS) stations on the E-group channels at Columbus, Georgia and Houma, Louisiana, and requested reinstatement of its applications.

2. *Background.* As the result of Commission lotteries, the above-referenced applications were selected for qualification review. Subsequently, Division staff initiated qualification review of the applications, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the applications were found to contain several deficiencies that precluded the staff from making a finding that Line was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its applications would serve the public interest. Line was notified by separate letters of these deficiencies and provided an opportunity to cure them within thirty (30) days of the dates of each letter.[1] Line was also advised in the deficiency letters that failure to file the requested information within thirty days could result in the dismissal of its applications.

3. Line provided some, but not all, of the requested information. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Rules, and by letter, the Division dismissed Line's applications for failure to comply completely in a timely manner with the Division's request for information. After acknowledging that it had failed to submit all of the requested information, Line states, on reconsideration, that "it would be in the public's interest to have a company with a business plan, a timetable, and a track record in the subscription television industry construct the ... station." Line's Columbus Petition at 2. Line argues its Columbus application should be reinstated because: (1) it intended to submit in the future a lease option agreement; and (2) it has a business plan to develop MMDS stations in four other markets and that it is a partner in the Las Vegas operator, where one MMDS station has been constructed. In addition, Line states that its Houma application should be reinstated because it intended to submit in the future a lease or lease option agreement and an ITFS interference analysis. Line's Houma Petition at 2.

4. *Discussion.* As of the date of the Division's dismissal actions, Line had submitted some, but not all, of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Line had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter sites as required by Section 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint, Inc.*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. Also, Line failed to comply with the Division's requests to submit the Section 21.902(i) ITFS interference analyses for its applications. At the time of the dismissals, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific requests that these analyses

[1] The deficiencies cited in each letter were the absence of: (1) a public interest statement, pursuant to 47 C.F.R. Sec. 21.13(a)(4); (2) current financial qualification data or a financial certification, pursuant to 47 C.F.R. Sec. 21.17; (3) a non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (4) tariff exhibit, as required by Item 29 of FCC Form 435; (5) emergency repair procedures and maintenance program, pursuant to 47 C.F.R. Sec. 21.15(e); (6) answers to questions on pages 5, 6 and 7 of FCC Form 435; (7) interference showing, as required by 47 C.F.R. Sec. 21.901(d)(7); (8) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i); and (9) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a).

[2] Even if Line was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to Sec. 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia*,: "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*

be submitted by specified dates. Line failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122,5123 (Comm. Car. Bur. 1988).

6. Line had a duty to submit curative amendments to its applications within thirty days of the Division's written request, or to obtain an extension of time.[4] *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for approximately seven months (Columbus) and almost fourteen months (Houma) substantially impeded the expeditious offering of MMDS at Columbus and Houma. Also, Line's failure to respond in a timely manner to the Division's requests for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissals, Line had not provided the required ITFS interference analyses and the required leases or lease option agreements. The Division was not in a position, therefore, to complete evaluation of Line's MMDS station proposals and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors, Inc.*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion and Ordering Clause*. Having carefully considered the arguments and evidence presented, we find that the dismissal of these applications for failure to comply with the Division's requests for information was proper, reconsideration of the action is not warranted, and reinstatement of the applications is not justified.[5] Accordingly, IT IS ORDERED that the petitions for reconsideration filed by Line of Site, Inc. regarding the above-referenced MMDS applications ARE DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] Line requested on extension of time to respond to the Columbus deficiency letter. The requested time period expired approximately four (4) months prior to dismissal.

[5] In the same document in which it requested reconsideration concerning its Columbus application, Line also requested a stay. Due to our disposition of Line's reconsideration petition, we hereby dismiss its request for stay as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-106

In re

Amendment of Part 74 of the
Commission's Rules Governing Use
of the Frequencies in the
Instructional Television Fixed Service

NOTICE OF PROPOSED RULE MAKING

Adopted: April 6, 1993; **Released: April 26, 1993**

Comments Due: June 14, 1993
Reply Comments Due: July 29, 1993

By the Commission: Commissioner Marshall not participating.

1. On July 23, 1992, the Commission issued a *Public Notice* seeking comment on four petitions requesting waiver of our rules regarding the provision of formal educational and other Instructional Television Fixed Service (ITFS) programming on every licensed ITFS channel. The *Public Notice* urged commenters and opponents specifically to address the question of whether the four requests would best be addressed in a waiver proceeding or in a rule making proceeding. Having examined the comments[1] and the issue, we find, for reasons set forth below, that the proper avenue for addressing the fundamental regulatory concerns expressed in the waiver requests is a rule making proceeding. Accordingly, we initiate this *Notice of Proposed Rule Making* to solicit further comment on our minimum ITFS programming requirements.

BACKGROUND

2. Since its inception in 1963, ITFS has had as its primary purpose the transmission of instructional material to accredited public and private schools, colleges and universities for the formal education of students. *Educational Television*, 39 F.C.C. 846, 852-53 (1963), *recon. denied*, 39 F.C.C. 873 (1964). We have not, in the nearly 30 years since the inauguration of the ITFS service, deviated from that primary purpose in fashioning ITFS rules, and amendments to those rules. What we have calibrated, however, is the point of equilibrium in attempting to balance the fixed educational purpose of ITFS with fluid factors, such as the ability of educators to finance the construction and operation of ITFS facilities, the utilization of the spectrum, and the growth of "wireless cable"[2] as a competitive spur to conventional cable operators. Indeed, upon initiation of ITFS in 1963, we were urged by manufacturers to expand eligibility so as to encourage a great many users to enter the service, thereby increasing the demand for equipment and lowering costs to educators. *Id.* at 854. Instead, we limited those who could apply for ITFS, noting that "[i]t would not be in the public interest to create a demand far in excess of the capacity of the band." *Id.* The service, however, was founded on the principle that most ITFS systems "will require more than one channel so that teaching material in several subjects may be transmitted simultaneously." *Id.* at 846.

3. Twenty years later, we acknowledged that there was far less demand for ITFS spectrum than originally anticipated: although the 28 ITFS channels were heavily utilized in several large metropolitan areas, other large metropolitan areas had no licensed ITFS stations. *Instructional TV Fixed Service - Report and Order in Gen. Docket No. 80-112 (Report and Order)*, 94 F.C.C. 2d 1203, 1214 (1983), *recon. denied*, 98 F.C.C. 2d 129 (1984). In addition, there was little ITFS spectrum in use outside the large metropolitan areas. *Id.* But even as we conceded the underutilization of ITFS spectrum during the first 20 years, we foresaw an increase in demand for channels by institutions of higher education for the delivery of graduate level training to the workplaces of engineers, scientists, and other professionals. *Id.* at 1220. Conversely, the prognostication for ITFS use by elementary, junior high and high school systems, as well as for delivery of health services information, was less optimistic. *Id.* Thus, while reaffirming our belief in the concept of spectrum reserved for educational service, we reallocated eight of the 28 ITFS channels, the E- and F-channel groups, to the burgeoning wireless cable sector. *Id.* at 1247. At the same time, in concert with our principle of balancing the educational purpose of ITFS, we attempted to bolster ITFS licensees by permitting them to use their excess capacity for non-ITFS purposes in order to generate revenues for their facilities. *Id.* at 1250. Although we initially rejected specific time limitations on non-ITFS use of licensee excess channel capacity, we expected licensees to "utilize each of their ITFS main channels substantially for legitimate ITFS use." *Id.* at 1251.

4. In adopting the present quantitative minimum of weekly educational programming on each ITFS channel for those ITFS licensees leasing excess capacity, we emphasized that this time limitation was an "elementary necessity to guarantee the intended use of ITFS channels in the face of the revenue-generating uses which will also be permitted." *Instructional TV Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 85 (1985). In lieu of a strict reservation scheme, we established a minimum actual use of 20 hours of educational programming per channel per

[1] A list of the parties filing comments and replies is provided in the Appendix, with abbreviated descriptions of associations and joint parties.

[2] "Wireless cable" is a term used to describe Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS), which utilize over-the-air microwave radio channels rather than coaxial or fiber optic cable to deliver video material to subscribers. There are 12 or 13 channels available to wireless cable for full-time use: 11 MMDS channels, E1-E4, F1-F4, and H1-H3; two single-channel MDS channels available in 50 cities; and one single-channel MDS channel in the rest of the country. In addition, wireless cable has access to the 20 ITFS channels, A1-A4, B1-B4, C1-C4, D1-D4, and G1-G4, on a leased, part-time basis. We do not intend to suggest by our use of the term "wireless cable" that it constitutes "cable" service for statutory or regulatory purposes.

week, with an equal, readily recapturable amount to be "preserved" for use at a later time. This recapture element harmonized the primary purpose of ITFS, presentation of educational programming for instructional use, with the needs of new ITFS entities, unable to commence operations with a 40-hour schedule, and the needs of wireless cable lessees, able to provide service where there would otherwise be an "unnecessary waste of valuable airtime." *Id.* However, we specifically rejected the practice of day loading, the shifting of all requisite programming to one day of the week, and channel loading, the shifting of all requisite programming to one channel. Instead, we required that a minimum of 20 hours of actual use per channel per week of ITFS programming be scheduled at least three hours each weekday, between 8:00 a.m. and 10:00 p.m., and five additional hours, Monday through Saturday, between 8:00 a.m. and 10:00 p.m. An additional 20 hours of ready recapture time was to be scheduled on each channel with the same scheduling restrictions. Finally, we noted that prospective licensees which could not meet the established standards but wished to lease should consider the feasibility of merging or sharing facilities with others whose needs were similarly slight. *Id.* at 88.

5. We ratified our commitment to minimum programming requirements for ITFS licensees leasing excess capacity in *Report and Order (Wireless Cable Order)*, 5 F.C.C. Rcd 6410, 6416 (1990), underscoring that excess capacity usage is "ancillary" and that the ITFS spectrum was allotted for transmission of educational materials, not as a source of financial support for educational institutions. Yet, we relaxed our minimum actual use requirement to 12 hours per channel per week for the first two years of an ITFS station operation in hopes of stimulating ITFS expansion and facilitating the initiation of new wireless cable systems. *Id.* at 6416.

6. Upon reconsideration of our leasing restrictions, we agreed that Section 74.932, which limits eligibility to accredited local educators, and Section 74.931(e), which requires 20 hours per channel per week of actual educational programming for those licensees leasing excess capacity, were sufficient to insure that ITFS licenses were not secured merely to realize financial gain from wireless cable operators. *Wireless Cable Order Recon.*, 6 F.C.C. Rcd 6764, 6773-74 (1991).[3] Consequently, we revised the rules once again to strike "the appropriate balance between our interest in promoting alternative uses of excess ITFS spectrum, on the one hand, and our interest in ensuring that ITFS entities retain the right to fully exploit their ITFS channels for legitimate educational purposes, on the other." *Id.* at 6774. With regard to the 20 hours per channel per week of actual use and 20 hours per channel per week of recapture time, we removed the time-of-day and hours-per-day restrictions, permitting ITFS licensees to fulfill the per channel minimum required programming at any time of the day and on any day of the week. We also rendered the recapturability by the ITFS licensee subject to one year's written notice to the wireless cable lessee. Moreover, we acknowledged the permissibility of using channel mapping technology, which, we believed, could meet both our leasing restrictions and the lessee's programming need for apparent full-time use of the same channels. Channel mapping technology allows an ITFS licensee with a staggered schedule to transmit ITFS programming over each of the four channels and a student-viewer to receive that programming on what appears to be uninterrupted service on as few as one channel. Wireless cable lessees are also able to channel map their commercial programming over the channels so that their subscribers receive what appears to be uninterrupted service on as many as three channels. In sanctioning the utilization of channel mapping, we described an arrangement in which "[t]he leasing is scheduled on different channels in a staggered pattern," so that "[t]he subscriber's channel selection is unchanged and the subscriber is unaware that the channel is automatically switched." *Id.* We did not sanction, however, the diversion of all ITFS programming to one channel only, nor did we endorse any specific amount of channel time that could be mapped to another channel. Moreover, we cautioned ITFS applicants that they "should not request more frequencies than necessary for their educational needs." *Id.* at 6774 n.48.

7. Most recently, in order to create a "shared and symbiotic use of spectrum," we permitted wireless cable entities to be licensed on a maximum of eight of the remaining 20 ITFS channels in communities where at least eight other ITFS channels remain available in that area for future ITFS use.[4] *Second Report and Order in Gen. Docket 90-54*, 6 F.C.C. Rcd 6792, 6802 (1991). We provided ITFS entities with the right to demand access to those wireless cable facilities licensed on the ITFS frequencies. Indeed, we allowed ITFS operation on all ITFS frequencies, if the demand for ITFS warranted the use of all channels,[5] while limiting access to a maximum of 40 hours per channel per week, with the ITFS operator entitled to 20 of those hours during specific periods of the day.[6] This access limitation, we noted, rendered "the outer limits of a wireless cable operator's exposure to liability measurable, so that it can make a reasonable judgment as to whether a wireless cable system dependent on ITFS channels would be viable." *Id.* at 6803.

8. In February 1992, four ITFS permittees, North American Catholic Educational Programming Foundation, Inc. Spokane Community College, Spokane Falls Community College, and Gonzaga University Telecommunications Association (the permittees), each submitted a revised programming schedule and concomitant request for waiver of Sections 74.931(a) and (e)(2) of the Commission's Rules. Section 74.931(a) provides that every authorized channel "must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools." Section 74.931(e)(2) requires that an ITFS licensee leasing its excess capacity to a wireless cable operator provide at least 20 hours per channel per week of ITFS programming and reserve an additional 20 hours per

[3] But we cautioned that we would strictly enforce the existing eligibility rules and, if the need arises, would consider restricting ITFS eligibility. *Id.* at 6774 n.47.

[4] For the various restrictions governing the wireless cable entities' use of ITFS frequencies, see *Second Report and Order*, 6 F.C.C. Rcd at Appendix C.

[5] While no minimum amount of programming is required of an ITFS entity seeking access to channels licensed to a wireless cable operator, the ITFS entity must utilize at least 20 hours per week on each channel before requesting another. *Second Report and Order*, 6 F.C.C. Rcd at 6804.

[6] An ITFS entity has an unqualified right to transmit its programming for 15 of those 20 hours between 8:00 a.m. and 10:00 p.m. Monday through Friday, excluding holidays and school vacations, and the remaining five hours between 8:00 a.m. and 10:00 p.m. Monday through Saturday. *Id.*

channel per week, subject to one year's advance written notification, for such programming. The four permittees, each authorized to operate four channels in Spokane, Washington,[7] seek waiver of these rules so that each may transmit a minimum of 80 hours of educational programming on only one of its channels. This schedule would allow the permittees to "channel load" their minimum ITFS program requirements of 20 hours per channel per week onto one channel so that each could lease its remaining three channels on a 24-hour basis to Skyline Entertainment Network (Spokane) Limited Partnership, a wireless cable operator and the permittees' excess capacity lessee. As for the demonstration of need for four channels, a prerequisite for an ITFS license provided in Section 74.902(d), the permittees assert that such a need is "self-evident": without four channels, a wireless cable operator would be unwilling to construct the ITFS facility.

9. As we have noted in the past, the function of a request for waiver is not to change the general standard, a matter in which the opportunity for general comment is a prerequisite under Section 553(a) of the Administrative Procedure Act, but to justify an *ad hoc* exception to that standard on the ground that it works against the public interest in the particular case. *VHF Drop-In Proceeding*, 90 F.C.C. 2d 160, 166 (1982), *aff'd sub nom. Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620 (10th Cir. 1983). However, a general rule, deemed valid because its overall objectives are in the public interest, may not be in the public interest if extended to an applicant which proposes a new service that will not undermine the policy served by the rule. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (1969). Here, we find that the permittees, authorized to operate ITFS stations and intending to lease their excess capacity to a wireless cable operator, features possessed by most ITFS licensees, have failed to demonstrate the "special circumstances" generally required to trigger the "safety valve" of a waiver proceeding. *Id.* Nevertheless, we are persuaded that review of our underlying rules is warranted. To that end, we initiate this rule making, on an expedited basis, in order to address the issues raised by the permittees in their waiver requests.

PROPOSED RULES CHANGES

Comments

10. Although the scope of the *Public Notice* was limited to the question of whether the issue of channel loading should be addressed in a waiver or rule making proceeding, most of the commenters, in anticipation of a *Notice*, argued the advantages and disadvantages of modifying Sections 74.931(a) and (e)(2). We include some of the comments here in order to lay the foundation for an informed debate regarding our proposed rules changes.[8]

11. Those favoring the use of channel loading argue, as did the four permittees in their waiver requests, that our approval of the use of channel mapping technology makes our approval of channel loading the "next logical step." They contend that since the licensee of a four-channel ITFS station can stagger its schedule to implement channel mapping so that only one of its channels is employed at a given time to transmit ITFS programming, and where only one of its channels is ever employed for receipt of that programming, the Commission should "remove the fiction of channel mapping" and simply allow licensees to transmit all required programming on one channel for receipt on that channel. This would enable wireless cable operators to lease three channels on a full-time basis, necessary for its commercial programming, without the expenses affiliated with channel mapping. The cost of the channel mapping switch alone, according to WCA, is $115,000, in addition to $100,000 for time-base correction equipment, $700 per month for increased space, power and environmental controls associated with the switching equipment, and $150 for each set-top converter to be installed on every subscriber's television set.[9] A system with 10,000 subscribers, WCA estimates, could spend at least $1 million to implement channel mapping alone, funds that could be better spent, several wireless cable operators note, developing additional systems, increasing the support for educational activities, and funding the addition of new subscribers. While several wireless cable operators endorse retention of the licensee's right to simultaneously program all of its licensed channels as a "safeguard" designed to ensure that an educator's future needs are accommodated in a channel loading scheme, WCA rejects such a proposal if it is mandated by the Commission. Although WCA supports ready recapture rights to all channels if negotiated for by the ITFS licensee and the wireless cable operator, it asserts that required preservation of all channels would continue to necessitate the use of channel mapping technology, in the event the licensee were to exercise its rights.

12. Even those educators opposed to channel mapping agree that the technology is beneficial because it isolates educational from commercial programming, thereby avoiding situations where students accidentally view adult commercial programming before or after a scheduled educational program. However, the major disadvantage to channel mapping, NIA notes, is that it precludes the simultaneous use of ITFS channels for instructional use, "often relegating the educational programs to one or two channels." And, channel loading, according to NIA, will ultimately lead to the proposal that three of the four ITFS channels in each of the five channel groups be directly licensed to wireless cable operators. This, in turn, would effectively terminate the "healthy and robust partnership" which derives from balancing the protection of traditional ITFS use and the growth of the wireless cable industry. In contrast, a group of commenters, the ITFS Parties, con-

[7] The permittees' authorizations are as follow: Gonzaga University Telecommunications Association, B-group channels on WLX-516; North American Catholic Educational Programming Foundation, Inc., C-group channels on WLX-276; Spokane Community College, D-group channels on WLX-515; and Spokane Falls Community College, G-group channels on WLX-514.

[8] Comments submitted by parties in response to the *Public Notice* will be maintained as part of the record in this proceeding.

[9] In addition to the substantial costs associated with channel mapping, there are, according to WCA, several other drawbacks to the technology: it is impossible for viewers to view one channel while recording another on a video cassette recorder, to automatically tape consecutive programs on separate channels, or to utilize the "picture-in-picture" features of newer television and video cassette recorders without the aid of additional expensive equipment.

tends that although they are not "comfortable" with the Commission's approval of the use of channel mapping, they "see no virtue in requiring the reality of the use of ITFS channels to be different than the appearance of that use." However, the ITFS Parties caution, channel loading must be counterbalanced with safeguards in order to prevent the *de facto* reallocation of three channels of every ITFS channel group. One such safeguard suggested by the ITFS Parties is Commission review of any ITFS lease permitting channel loading to ensure ready recapture on each of the three remaining channels. Second, the ITFS Parties urge the Commission to require a heightened demonstration of "*bona fide* educational intent" to ensure that the ITFS licensee will actually provide an educational service that "will be used by local institutions and that its future use of the channels will be dictated by educational goals, not an intent to maximize lease revenues."

13. The panacea to the Commission's difficulties in allotting ITFS spectrum, according to many commenters, educators as well as wireless cable operators, is digital compression. Implementation of this technology may soon make it possible for the licensee of a four-channel ITFS station to simultaneously transmit 40 or more compressed video programs over the station's 24 MHz of spectrum. But WCA and NIA diverge as to how to modify Sections 74.931(a) and (e)(2) to address digital compression. WCA suggests imposing minimum formal educational programming and other ITFS programming requirements on a "per station" rather than on a "per channel" basis, thereby encompassing the current technology of channel mapping, the implementation of channel loading, as well as that of digital compression, which may yield as many as 10 program paths per channel, and of digital advanced television, which may yield only one or two very high quality advanced signals.[10] NIA, conversely, views digital compression as a guarantor of the availability of 20 program paths, or four channels in five channel groups, to be utilized substantially for ITFS programming.

Discussion

14. At the outset, we must address the confusion that our recognition of channel mapping technology apparently has engendered. We did not, in sanctioning the use of channel mapping, intend to revise or eliminate the requirements of our ITFS rules governing minimum instructional use, Section 74.931, or the demonstration of need for the number of channels requested, Section 74.902. Rather, we believed that channel mapping might permit a less disruptive scheduling of instructional and commercial uses of ITFS channels to the benefit of both educational institutions and wireless cable operators. We did not envision that channel mapping technology would be utilized to an extreme by diverting all instructional programming to only one channel. However, we now believe that a relaxation of the per channel minimum use requirements may be appropriate in order to permit a more flexible leasing scheme that will benefit and nurture ITFS operations during the transition to an era of channel compression technology.

15. Specifically, we propose to permit ITFS applicants to seek up to four channels where they propose a minimum average of 20 hours of use per channel per week, regardless of the distribution of that use via channel mapping. Thus, an ITFS applicant could request four channels so long as it proposes a minimum of 80 hours of instructional use, even if all 80 hours are diverted to only one of the channels. Under such a proposal, there is no reason to prohibit channel loading, as opposed to channel mapping, as the means for freeing up channels for leasing to wireless cable operators. Indeed, if we allow the diversion of all instructional programming to one channel by the use of channel mapping technology, it is senseless to prohibit the same result by the use of less costly channel loading. The policy debate at issue here is not the mechanism by which ITFS channel time is made available to wireless cable operators, but how we can preserve the primary purpose of ITFS in light of our proposals here. We seek comment on these proposals, including the benefits and detriments which they may bring. We recognize that the relaxation we offer here carries certain risks and we expressly invite comment on those dangers. We are particularly interested in comments addressing the issue of whether and in what manner this proposal might constitute a *de facto* reallocation of the ITFS spectrum, as some commenters fear. At least preliminarily, we believe that the current needs of ITFS licensees for funding, of wireless cable operators for channel capacity, and of the cable subscribing public for viable multichannel alternatives all favor the proposal we have outlined. We also believe, however, that the period in which this approach may best serve these needs is limited in duration and that the proper balance of licensing criteria in the ITFS service will be deeply affected by the arrival of digital compression technology.

16. Accordingly, we propose to authorize the more flexible ITFS licensing described above on a temporary basis, for between three and five years, until digital compression technology is a viable alternative, technologically and economically. We believe this length of time is appropriate in view of a report cited by WCA, which heralds the imminent arrival of digital compression: within two years wireless cable operators will be able to purchase digital video compression decoders and to install these within subscribers' households.[11] Indeed, in July 1992, we granted for the first time experimental licenses to two wireless cable operations, authorizing the use of the 2.5 GHz band for the testing of digital transmissions.[12] We seek comment regarding the duration of the temporary period, emphasizing that the terminus should be the anticipated date when digital compression can be practicably implemented. At the expiration of the temporary period, we shall examine the state of digital technology. If use of digital compression is

[10] The comments of the four permittees which originally sought waiver of our purpose and permissible service rules propose that we amend Sections 74.931(e) to prescribe "an average" of 20 hours per channel per week, similar to that required in Section 74.913(b)(4). That section provides for the awarding of one comparative point to applicants proposing a "weekly schedule of 21 or more average hours per channel per week," and two points for "41 or more average hours per channel per week of formal educational programming." As to Section 74.931(a), the permittees seem to suggest that the provisions of Section 74.931(e) would be exceptions to the requisite formal programming on each channel.

[11] Vivian Associates, Inc., *Wireless Cable and Compressed Video* at 4 (July 21, 1992).

[12] Cross Country Telecommunications, Inc., FCC File No. 3233-EX-PL-92, and People's Choice TV of Tucson, FCC File No. 3234-EX-PL-92, were granted those authorizations.

not yet feasible, we may extend that period, but if so, we shall at that time adapt our purpose and permissible rules in light of that technology.[13]

17. In proposing this interim measure, we attempt to meet the wireless cable operators' asserted demand for additional spectrum without reallocating the ITFS spectrum. We acknowledge the role the wireless cable industry has played in reinvigorating the ITFS service,[14] and we believe that channel loading will provide the incentive for wireless cable operators which may have been reluctant to invest in a "partnership" with an educator yielding no full-time access to ITFS channels. At the same time, we stress that this interim measure is permissive only, and not mandatory. Thus, those educators desiring to transmit instructional programming simultaneously on every channel may continue to do so, leasing their excess capacity pursuant to the modified minimum programming requirements. And, mindful of our long-standing commitment to the primary purpose of ITFS, we take note of the potential for abuse were we to permit channel loading without any offsetting restrictions upon its use. Therefore, we seek comment on whether and what additional means of safeguarding the primary purpose of ITFS in the event we permit the use of channel loading.

18. First, should the use of channel loading be limited so as to free up less than three full-time channels for commercial programming? Second, should a specified number of the required programming hours be scheduled during specific times of the day, such as between the hours of 8:00 a.m. and 10:00 p.m., Monday through Saturday? Third, should the ready recapture of all four channels be required so that an ITFS licensee may simultaneously transmit its programming on all channels if the need arises? or ready recapture of only three channels? or two? or one? Fourth, should a comparative advantage in mutually exclusive cases be awarded to those applicants refraining from the use of channel loading or channel mapping? If so, what number of merit points should such an applicant be entitled to? Finally, we seek comment on whether there should be, as suggested by the ITFS Parties, a heightened demonstration of *bona fide* educational intent in order to discourage applicants seeking a financial bonanza. If so, what should this "heightened demonstration" consist of? As to technical safeguards, we inquire whether those licensees utilizing channel loading should be given ITFS protection for their receive sites only with regard to the channel or channels being utilized for ITFS programming while protection for the remaining channels would be limited to the 15-mile protection of Section 21.902(d). Commenters are urged to suggest additional changes which would promote our objectives.

19. Finally, in the event we modify Sections 74.931(a) and (e)(2), we may have to reconcile Section 74.902(d) with that action. That section provides that a licensee "is limited to the assignment of no more than four channels for use in a single area of operation" and that the number of channels authorized to an applicant "will be based on the demonstration of need for the number of channels requested." Several commenters favoring channel loading, suggest that because Section 74.902(d) was not undermined by channel mapping, it is, therefore, not undermined by channel loading. As for demonstration of need for the channels requested, the permittees seeking waiver of our rules assert, as noted above, that the need for four channels is "self-evident." They insist that an authorization of fewer than four channels renders an ITFS licensee undesirable to a wireless cable operator willing to finance the construction and operation of a station in exchange for an excess capacity lease agreement. Moreover, these commenters contend, the educator-licensee's ready recapture rights of the remaining channels for simultaneous transmission of ITFS programming comports with the required demonstration of need of Section 74.902(d). We seek additional comments on these issues.

PROCEDURAL MATTERS

Ex Parte Considerations

20. This is a nonrestricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules. *See generally*, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

Comment Information

21. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **June 14, 1993,** and reply comments on or before **July 29, 1993**. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, DC 20554.

Initial Regulatory Flexibility Analysis

22. *Reason for the Action:* This proceeding was initiated to review the procedures which govern the operation of facilities in the ITFS service.

23. *Objective of this Action:* The *Notice* is intended to seek comment as to how to maintain a balance between the primary purpose of the ITFS service and the needs of the wireless cable industry in light of recent, as well as imminent, technological advances.

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[13] We decline, therefore, to now modify Sections 74.931(a) and (e) in anticipation of digital compression technology, as WCA would have us do. Moreover, at the expiration of the temporary period, we may also be better able to address the impact of high definition television, or HDTV, on the ITFS service.

[14] As we noted in a recent Notice of Proposed Rule Making, in *Amendment of Part 74 of the Commission's Rule with Regard to the Instructional Television Fixed Service in MM Docket No. 93-24*, 8 F.C.C. Rcd 1275 (1993), 454 new or major change ITFS applications were filed in fiscal year 1991 alone. The following year, the number of applications doubled, with more than 90 percent of them containing excess capacity lease agreements with wireless cable operators which supply funding for the construction and operation of the ITFS' facilities.

24. *Legal Basis:* Authority for the action proposed in this *Notice* may be found in Sections 1, 3, 4(i) and (j), 303, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303, 308, 309, and 403.

25. *Number and Type of Small Entities Affected by the Proposed Rule:* Approximately 1,200 existing and potential wireless cable and ITFS operators could be affected by proposals contained in this *Notice*.

26. *Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:* None.

27. *Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:* None.

28. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:* None.

29. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposal suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

Paperwork Reduction Act Statement

30. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to impose no new or modified information collection requirement on the public.

Ordering Clause

31. Accordingly, IT IS ORDERED that pursuant to Sections 1, 3, 4(i) and (j), 303, 308, 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 303, 308, 309, and 403, this *Notice of Proposed Rule Making* IS ADOPTED.

Additional Information

32. For additional information on this proceeding, contact Anne Lucey, Mass Media Bureau, (202) 632-6357.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

List of Commenters

Initial Comments

1. Maureen Smith, Executive Director of Telicare

2. North American Catholic Educational Programming Foundation, Inc.

3. Community Telecommunications Network

4. Joint Comments of ITFS Parties: Association for Higher Education of North Texas; Arizona Board of Regents for Benefit of the University of Arizona, Iowa Public Broadcasting Board; Regents of the University of New Mexico and Board of Education of the City of Albuquerque, New Mexico; South Carolina Educational Television Commission; State of Wisconsin - Educational Communications Board, and the University f Maine System (ITFS Parties)

5. WJB-TV Ft. Pierce Limited Partnership and WJB-TV Melbourne Limited Partnership

6. Twenty-One Wireless Cable Licensees and Operators

7. Clarendon Foundation

8. Cross Country Telecommunications, Inc.

9. Ruralvision South and Ruralvision Central

10. Wireless Cable Association International, Inc. (WCA)

11. Skyline Entertainment Network (Spokane) Limited Partnership, Spokane Community College, Spokane Falls Community College, and Gonzaga University Telecommunications Association

12. Specchio Developers Investment Corp.

13. American Wireless Systems, Inc.

14. The Consortium of Concerned Wireless Cable Operators

15. National ITFS Association (NIA)

16. Vermont Wireless Consortium

17. Trans Video Communications, Inc.

Reply Comments

1. National ITFS Association (NIA)

2. Wireless Cable Association International, Inc. (WCA)

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-358

In the Matter of

Amendment of Part 22 of the
Commission's Rules Relating to
License Renewals in the
Domestic Public Cellular Radio
Telecommunications Service

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: March 11, 1993; Released: April 9, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. In our Report and Order in this proceeding, 7 FCC Rcd 719 (1992), we established standards for conducting cellular radio comparative renewal proceedings.[1] Such proceedings are undertaken when an applicant seeks renewal of its license in the Domestic Public Cellular Radio Telecommunications Service (cellular radio service) and challengers file competing applications. We also created standards for awarding a renewal expectancy, which we established as a major comparative preference awarded to a licensee for its performance during its license term; basic qualifications standards for challengers; procedures for preventing possible abuses in the comparative renewal process; and filing and hearing procedures designed to expedite comparative cellular renewal proceedings.

2. U S WEST NewVector Group, Inc. (NewVector) and BellSouth Corporation, BellSouth Enterprises, Inc., BellSouth Mobility Inc., and American Cellular Communications Corporation (collectively "BellSouth") have filed petitions for reconsideration of that Report and Order. Ameritech Mobile Communications, Inc. (Ameritech), McCaw Cellular Communications, Inc. (McCaw), and Bell Atlantic Mobile Systems, Inc. (Bell Atlantic) filed comments on those petitions for reconsideration, while Rochester Telephone Mobile Communications (Rochester) and Southwestern Bell Mobile Systems, Inc. (Southwestern Bell) filed responses to those petitions. BellSouth filed a reply to the foregoing comments and responses.

3. In this Memorandum Opinion and Order, we replace the first of the three renewal expectancy criteria with a standard requiring a renewal applicant to demonstrate that its performance has been "substantial," defined as sound, favorable and substantially above a level of mediocre service just minimally justifying renewal. We also adopt a two-step hearing procedure which allows the Commission to grant a renewal application without conducting a full comparative hearing if a threshold hearing determines that the renewal applicant has performed substantially and thus deserves a renewal expectancy. Thus, if a licensee receives a renewal expectancy in the threshold hearing, we have made a generic public interest finding that competing applicants will not be considered eligible for grant of the license in question.[2] In addition, we eliminate the last of the three renewal expectancy criteria to clarify the point that misconduct by a licensee that does not involve the Commission's rules or processes is not considered in awarding a renewal expectancy, although such misconduct can disqualify a renewal applicant. Finally, we revise and clarify certain substantive and procedural rules for comparative cellular renewal hearings.

II. ISSUE ANALYSIS

A. Renewal Expectancy

4. In our Report and Order, we determined that a cellular radio licensee would receive a renewal expectancy if, during its past license term, it (1) had substantially used its spectrum for its intended purpose; (2) had substantially complied with applicable Commission rules and policies, and the Communications Act; and (3) had not otherwise engaged in substantial relevant misconduct.[3] BellSouth and NewVector argue that we should eliminate our third criterion and make clear that the decision to award a renewal expectancy will be determined by that licensee's own record of FCC-related past performance in the particular market and not by the licensee's misconduct elsewhere or the conduct of affiliated companies.

5. Petitioners argue that because the primary rationale for granting a renewal expectancy is that the licensee's record of past performance is the best available evidence for predicting its future performance, "relevant non-FCC misconduct" that did not affect the performance of a licensee's cellular system in the renewal market should not be considered. Petitioners admit that non-FCC misconduct unrelated to the system's performance may, in some instances, raise questions concerning the licensee's basic character qualifications to be a licensee. Nevertheless, the petitioners contend that any such character matters are relevant only to the extent that they warrant disqualification. They note that the Commission has already decided that non-FCC misconduct is not presumptively relevant as

[1] National Cellular Resellers Association (NCRA) has filed a petition for review of the Report and Order. *National Cellular Resellers Assoc. v. FCC*, No. 92-1104 (D.C. Cir., filed Mar. 6, 1992). The court is holding that case in abeyance pending the Commission's action on the petitions for reconsideration herein.

[2] Our two-step procedure allows a competing applicant which proposes to provide service which far exceeds that presently being provided by the incumbent licensee to request a waiver of step one of the two-step procedure. See paragraph 25, n.20, *infra*.

[3] The foregoing criteria were derived from and are nearly identical to the standards for granting a renewal expectancy in the Public Land Mobile Service. *See Baker Protective Services, Inc.*, 59 RR 2d 1141, 1142 (1986)

a comparative criterion in other contexts; such misconduct may be considered, however, if it is sufficient to warrant disqualification.[4]

6. The third criterion established in the Report and Order for granting a renewal expectancy was intended to apply to misconduct which involves activities other than noncompliance with applicable Commission Rules and policies. The criterion includes four categories of "relevant non-FCC misconduct," all of which must have been adjudicated: (a) fraudulent misrepresentations to governmental units; (b) criminal misconduct involving false statements or dishonesty; (c) misconduct constituting a felony (or in some instances a serious misdemeanor); and (d) violations of antitrust laws, or laws prohibiting anticompetitive practices, involving communications services. We agree with petitioners that if such "relevant non-FCC misconduct" does not warrant disqualification of a licensee, it should not be considered in determining whether a licensee deserves a renewal expectancy.[5] Thus, since a cellular radio licensee's record of past performance as a cellular licensee is the best predictor of its future performance, non-FCC misconduct that does not affect the basic qualifications of the licensee as a cellular operator would not be relevant in determining whether the operator deserved a renewal expectancy. Parties to comparative renewal proceedings may attempt to demonstrate that non-FCC misconduct raises issues as to the basic qualifications of a licensee by filing authorized pleadings such as petitions to deny the licensee's renewal application. Nevertheless, we conclude that if the conduct does not raise issues of disqualification, then it is not germane in evaluating whether the renewal applicant deserves a renewal expectancy. Accordingly, we will eliminate our third criterion.[6]

7. In our Report and Order in this proceeding, we stated, with respect to the first of the three renewal expectancy criteria, that a cellular radio licensee which had constructed and operated its cellular system in accordance with Commission Rules has "substantially used its spectrum for its intended purpose." On reconsideration, we are concerned that the first renewal expectancy criterion may not be sufficiently broad in scope to ensure that licensees are required to demonstrate a substantial level of service as a basis for qualifying for a renewal expectancy. A licensee's substantial use of its allotted spectrum for the intended purpose of the allotment is an important element in determining the licensee's qualification for a renewal expectancy. We now have determined, however, that additional considerations pertinent to the licensee's performance during its license term should also be accorded considerable weight if we are to ensure that renewal expectancies are granted only in cases in which they are warranted and their grant will thus serve the public interest.

8. We thus conclude that we must define the first of the three (now two) renewal expectancy criteria in a manner which is more easily understood and more clearly consistent with relevant case law. We note that renewal expectancies have been affirmed when they were awarded to licensees whose performance during the past license term has been "substantial," defined as "sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal." *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 509 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983). We conclude that, in awarding a renewal expectancy to a cellular radio renewal applicant, in addition to the second criterion set forth above, we must determine that the licensee has provided "substantial" service during its past license term, defined as service which is sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal.

9. Our original intent in creating the first of our three renewal expectancy criteria, namely, that a licensee has substantially used its spectrum for its intended purpose, was to establish a standard which would assist in evaluating whether a renewal applicant deserved a renewal expectancy. We now decide, that the public interest would be better served by replacing our first proposed criteria with a standard requiring "substantial" service as defined above and provide examples of actions which a renewal applicant might have accomplished during the license period as possible bases for meeting this standard. These examples are not intended to be all-inclusive and renewal applicants will be free to delineate other positive accomplishments of their past license term. Thus, we will decide whether licensees have provided "substantial" service on a case-by-case basis. Depending on the relevant facts and circumstances, certain positive aspects of a licensee's performance during the past license term might be more significant than others. A licensee will be allowed to offer any combination of relevant accomplishments to attempt to justify a renewal expectancy.

10. Pursuant to Section 22.941(b) of the Commission's Rules, adopted in our Report and Order in this proceeding, cellular renewal applicants involved in a comparative renewal proceeding must submit a showing explaining why

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[4] *See Policy Regarding Character Qualifications*, 6 FCC Rcd 3448, 3450 (1991), *recon. granted in part*, 7 FCC Rcd 6564 (1992).

[5] If substantial and material questions are raised concerning the basic qualifications of any applicant, those questions would have to be resolved before comparative evaluation of the applicants can occur. As explained *infra*, such questions concerning the renewal applicant would be resolved in step one of our newly-adopted two-step hearing procedure, whereas such questions involving challenging applicants would be resolved only if step two of the hearing procedure takes place, *i.e.*, if a full comparison of all applicants occurs.

[6] We wish to remind all applicants that Section 22.13 of our Rules requires an applicant to reveal individuals who own five percent of the stock in a corporate applicant or licensee, as well as subsidiaries and affiliates of the applicant and principals and partners of the applicant. In this light, applicants should be aware that they must disclose any FCC misconduct of any person or entity with an interest in an applicant or licensee which must be revealed pursuant to Section 22.13 of our Rules. Further, we will require the reporting of relevant non-FCC misconduct involving entities which are not cellular radio licensees but which share an officer, director or cognizable shareholder or partner with a cellular licensee in situations where the licensee principal in question was in control of the other entity or was adjudicated to be directly involved in the other entity's misconduct. Relevant non-FCC misconduct of a cellular licensee's parent or related subsidiary must be reported if (a) there is a close ongoing relationship between the parent (or non-cellular subsidiary) and the cellular subsidiary; (b) the two have common principals; and (c) the common principals are actively involved in the operations of the cellular subsidiary. *See Policy Regarding Character Qualifications*, 7 FCC Rcd at 6566-67.

they should receive a renewal expectancy. At a minimum the showing must include the following facts concerning positive aspects of the licensee's operation of its cellular system:

> (1) A description of its current service area in terms of geographic coverage and population served, as well as the system's ability to accommodate the needs of roamers;
>
> (2) an explanation of its record of expansion, including a timetable of the construction of new cell sites to meet changes in demand for cellular radio service; and
>
> (3) a description of its investments in its cellular system.[7]

Evidence submitted under these requirements, as well as other kinds of evidence, can be used to demonstrate that the renewal applicant has provided "substantial" service during its license term. A licensee could, for example, rely on the following: (1) the degree to which the licensee has responded to developing or changing demand by expanding its cellular system; (2) the extent to which the licensee has made investments in its cellular system in order to improve the quality of service; (3) evidence of customer satisfaction, including an expanding customer base, lack of complaints, or expeditious and satisfactory resolution of complaints; (4) the extent to which service has been provided on a continuous basis, *i.e.*, the system has been reliable and has not had many (if any) significant outages; and (5) efforts toward further service integration and interoperability arrangements (*e.g.*, "hand-off" arrangements) with other cellular systems. A renewal applicant may make any other showing it deems pertinent to demonstrating its provision of benefits to the public.

B. Two-Step Hearing Procedure

11. Our Report and Order rejected a two-step hearing procedure on which we had requested comment in our Notice of Proposed Rule Making, 5 FCC Rcd 5593 (1990). The first step under that procedure would have involved determining whether a renewal applicant deserved a renewal expectancy. Under the two-step alternative, if the Commission determined that the renewal applicant should be granted a renewal expectancy, the renewal application would be granted, if the renewal applicant was otherwise qualified. If, on the other hand, the renewal applicant were not entitled to a renewal expectancy, the Commission would then compare the applicants pursuant to the comparative evaluation criteria described in the Report and Order. We decided that this two-step hearing procedure could run afoul of the provisions of Section 309 of the Communications Act of 1934, as amended (the Act), as interpreted by the courts. *See Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972) (*Citizens*). In *Citizens*, the court overturned as unlawful a similar two-step procedure created by the Commission for comparative broadcast renewal proceedings. Based on our reading of *Citizens*, we decided not to utilize the proposed two-step procedure. Instead, we decided to review a licensee's renewal application prior to hearing to determine whether the licensee had presented sufficient evidence to justify giving it a rebuttable presumption that it deserved a renewal expectancy. If such a presumption were granted, the burden of persuasion on the issue of entitlement to a renewal expectancy would switch to the challenging applicants.

12. In their petitions for reconsideration of our Report and Order, NewVector and BellSouth assert that we have sufficient legal authority to implement the foregoing two-step procedure, and they request that the procedure be implemented. Ameritech, Bell Atlantic, Rochester, and Southwestern Bell support that request. After carefully reassessing *Citizens*, we do not believe that adoption of the two-step procedure for comparative cellular renewal proceedings which we outline herein is necessarily inconsistent with *Citizens*. Further, even if our new procedure is considered to be inconsistent with *Citizens*, after considering relevant judicial precedents decided during the past twenty years since the issuance of *Citizens*, we conclude that *Citizens* appears to no longer represent the court's current thinking in this area, and that the court could thus be persuaded to overrule *Citizens*. We will, however, stay the effectiveness of the new Rule (Section 22.942) implementing the two-step procedure until this Order is final and no longer subject to judicial review. If judicial review of this Order is sought, we will support expedited judicial review to minimize any industry disruption our stay order may cause.

1. Public Interest Considerations

13. We believe that it would best serve the public interest for renewal challengers not to be considered eligible to receive a license if the incumbent has performed substantially and is entitled to a renewal expectancy. We believe that ensuring that cellular incumbents are not subject to competing applications once they have demonstrated substantial performance serves the public interest by assisting in achieving the same three objectives for which we awarded a renewal expectancy in the first place. These objectives are: (1) to encourage investment in cellular facilities; (2) to avoid the risk of replacing an acceptable service provider with an inferior one, based on unproven promises, and (3) to avoid disruption of cellular radio service.

14. With regard to encouraging investment in cellular facilities, our Report and Order concluded that renewal expectancies are necessary to encourage continuing investments in cellular facilities and thus to stimulate licensees to "build out" their systems and ensure quality service. 7 FCC Rcd at 720. In this regard, we observed that some capital expenditures by cellular licensees may not be recoverable before a particular license term expires. *Id.* Further, renewal expectancies provide assurance to investors and other sources of financing that their funds will not be placed in unreasonable jeopardy. *Id.*

15. Further, if the carrier can demonstrate its substantial performance during the license term, the two-step hearing lends a high degree of probability to the retention of the license, which in turn creates a favorable environment for

[7] Paragraph (4) of Section 22.941(b) of our Rules requests information concerning negative aspects of a licensee's conduct during a past license term, such as copies of orders finding the licensee to have violated Commission Rules.

investment and financing that otherwise would be compromised by the vagaries of the comparative hearing process. Ultimately, this likelihood of renewal, and the investment that will result from it, are beneficial to cellular customers. The further build-out of facilities by the licensee will bring cellular service more quickly to a greater number of potential customers. As we stated in our initial rule making proceeding adopting the initial cellular radio rules, our intention was to serve the public interest by:

> ...[I]mplementing a nationwide high-capacity mobile communications service capable of providing both local and roaming mobile telephone users the ability to place and receive calls.

Cellular Communications Systems, 86 FCC 2d 469, 502; *on reconsideration*, 89 FCC 2d 58 (1981); *on further reconsideration*, 90 FCC 2d 571 (1982); *appeal dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. March 3, 1983). We remain committed to this overarching policy of seamless national cellular service. The streamlined two-step hearing procedure we adopt today provides for the continued maintenance of a high level of service to customers of the burgeoning cellular radio industry.

16. With regard to the second objective of avoiding the risk of replacing an acceptable service provider with an inferior one, based on unproven promises, we explained that a comparison of a licensee's cellular system with a paper proposal will involve the Commission in decision-making that is necessarily subjective and based on speculation. 7 FCC Rcd at 720. And unless the paper proposal of a challenger is far superior to that of the renewal applicant, we would still be likely to grant the renewal applicant the license in a comparative hearing, because of the strength of the renewal expectancy as a comparative factor.[8] As noted above, we have substantially increased the burden for obtaining a renewal expectancy on reconsideration. Thus, by adopting a two-step procedure, we seek to avoid the risk that a fully competent service provider could be replaced by an inferior one. In our view, the logic of a renewal expectancy leads to the conclusion that a two-step hearing procedure is a legitimate means of reducing this risk. In other words, if the current licensee presents convincing evidence of substantial performance during the license term, then it would be an inefficient expenditure of our resources, and the resources of private parties, to proceed further, and therefore such a procedure would be contrary to the public interest.

17. In discussing the third objective of avoiding disruption of service, we noted that each cellular market has two facilities-based licensees. 7 FCC Rcd at 719. We observed that cellular subscribers are dependent upon their service provider and its established offerings and geographic coverage and that interruption to cellular service relied upon by the public could have a significant effect upon the ability of many persons to conduct their activities. *Id.* As a practical matter, any circumstance in which a cellular carrier which has served its customers for ten years is stripped of its license is likely to result in some degree of customer confusion and disruption. Thus, for example, if the renewal applicant loses its license in a comparative hearing and chooses not to sell or rent its equipment or transmitter sites to the new licensee, the public could suffer a temporary diminution of service.[9] Even if the renewal applicant prevails in the comparative hearing, the costs of that hearing and subsequent appeals and the uncertainty concerning whether the renewal applicant will retain its license will discourage the licensee from making any large capital expenditures to improve its cellular 80 system or to maintain its facilities at the highest level of efficiency during the time its license is in jeopardy. Again, we have concluded that a two-step hearing process, because it contributes to avoiding the risk of any disruption of service, serves the public interest.

18. The foregoing public interest considerations militate against a lengthy and expensive comparative hearing in situations in which such a hearing is not necessary. Comparative hearings not only expend considerable resources of all parties, including this agency, but they create a disincentive to continue investing in service during those hearings. Thus, since we have already established a renewal expectancy as the most significant preference awarded in a comparative renewal proceeding, we conclude that there is no significant public interest reason to continue the hearing once a renewal expectancy is awarded. We are able to make a general conclusion that the public interest is better served by renewing an incumbent cellular licensee who has substantially performed than considering the paper promises of a challenger.[10] This conclusion applies even in situations where the challenger may potentially better serve other cellular radio policies, *e.g.*, the attainment of further

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[8] In this regard, it appears unlikely that potential challengers to renewal applicants would propose to serve greater areas and populations than the incumbent licensee, pursuant to the first comparative issue listed in Section 22.941(d)(1) of our Rules. Differences in service areas among applications for new cellular systems in the top-30 markets were very significant factors when those markets were initially licensed. The initial licensees of all of our cellular markets (both Metropolitan Statistical Areas and Rural Service Areas) received the exclusive right to "fill-in" unserved areas of their respective markets for a period of five years. *See* Sections 22.31(a)(1) and (f) of our Rules. Nevertheless, after that five-year fill-in period expires, any licensee or potential applicant who wishes to serve an area within a market which is not already being served must file an application which is subject to mutually exclusive applications. *See* Sections 22.(6)(b)(2), 22.31(a)(ii) and (b)(2)(iii), and 22.902(b)(3), (4) and (5). A challenger might also attempt to show that its proposal would overcome a renewal expectancy because the challenger proposes earlier conversion to digital technology. Digital technology allows greater system capacity and can improve transmission quality. But early conversion to digital technology is not necessarily in the public interest because it may be premature. Digital technology is continually being developed and improved, and better and less expensive technology (both for the cellular system and the mobile and portable units) may be available in the near future. Thus, it would not generally be in the public interest to override a cellular operator's judgment about the appropriate time for conversion to digital technology by giving a comparative preference to challengers who propose earlier conversion.

[9] Further, ordering and billing procedures could be affected, and customers could be confused and adversely impacted by rate and service changes.

[10] "[T]he weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978) (*NCCB*). Whether to perform this task by rule making or by individual adjudication is a choice "that lies primarily in the informed discretion of the Commission." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

service integration and interoperability arrangements with other cellular systems.[11] Accordingly, unless a competing applicant obtains a waiver of step one of the two-step procedure, a competing applicant will be found ineligible for a step two comparative hearing if the renewal applicant obtains a renewal expectancy in a step one hearing.

2. Application of the Citizens Case

19. In our Report and Order, we decided against using a proposed two-step procedure because we felt that it could run afoul of the provisions of Section 309 of the Act as interpreted by *Citizens*. Nevertheless, as BellSouth observes,[12] *Citizens* arose in a broadcast context rather than a common carrier context. Further, the policy statement overturned by the court in *Citizens* was not the result of a rule making proceeding or Notice of Inquiry, whereas the procedure we adopt today results from a rule making proceeding and includes a special waiver procedure which was not before the court in *Citizens*. Significantly, the procedure rejected by *Citizens* foreclosed the Commission from considering an important public interest goal of comparative broadcast proceedings for initial licenses, namely, the encouragement of diverse ownership of mass media outlets.[13] With regard to the diversity of ownership goal, the Commission assumes a linkage between media ownership and programming by a broadcast licensee. *See Citizens*, 447 F.2d at 1213-14, n.36. In fact, *Citizens* stated that the Supreme Court has recognized "on numerous occasions" the distinct connection between diversity of ownership of the mass media and the "diversity of ideas and expression required by the First Amendment." *Id.* Thus, in a comparative broadcast renewal case, even after a renewal expectancy is awarded and given the greatest weight, there is still a public interest issue to be examined that could conceivably outweigh the renewal expectancy. In cellular radio comparative renewal proceedings, which involve common carrier services, there are no analogous potential viewpoint diversity issues or concerns.

20. There is no question that the Commission has traditionally distinguished between broadcasting and common carrier service on First Amendment grounds; that is, the difference between a license granting the holder content control (broadcasting) and a license involving the provision of a conduit to others for communications (common carrier). *See, e.g., Network Project v. FCC*, 511 F.2d 786, 795 (D.C. Cir. 1975), where the court rejected petitioner's effort to import the First Amendment concepts applicable to broadcasters into a common carrier context. Since there are no analogous viewpoint diversity concerns in the cellular radio area, a renewal expectancy in the cellular context can be given even more weight in comparison to its considerable significance in the broadcast area. In short, once a cellular licensee establishes that its past service record warrants a renewal expectancy, there is no significant public interest issue to litigate, unless the challenger has made a showing to justify a waiver of step one of the two-step hearing procedure. Thus, our newly-adopted two-step hearing procedure is designed to avoid meaningless hearing proceedings and to streamline what could be an expensive yet unnecessary exercise. In conclusion, we do not believe that the two-step hearing procedure which we adopt today is necessarily inconsistent with *Citizens*.[14]

21. Alternatively, if our two-step hearing procedure is deemed inconsistent with *Citizens*, we believe the court can be persuaded to overrule *Citizens* because the case no longer represents the court's current thinking in this area. In *Citizens*, the court ruled that Section 309(e) of the Communications Act and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (*Ashbacker*) require that challengers filing competing applications against the renewal application of a broadcast licensee are entitled to a full comparative hearing and that a two-step hearing was unlawful. 447 F.2d at 1211-13. The *Citizens* case also interpreted *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (*Storer*), as ruling that whatever power the Commission might have to set basic qualifications standards and to deny hearings to unqualified applicants, *Storer* cannot be read to allow the Commission to deny qualified applicants their statutory right to a full hearing on their own merits. 447 F.2d at 1212 n.34. Nevertheless, as noted above, we believe that relevant case law decided after *Citizens* has interpreted *Storer* and *Ashbacker* in ways which allow us to undertake the foregoing two-step hearing procedure, and that *Citizens* no longer reflects the current thinking of the D.C. Circuit.

22. More recent case law takes a broader view of agency authority to adopt public interest-based eligibility standards. Such cases undercut *Citizens'* premise that qualified challengers have an absolute right to a hearing under Section 309(e) of the Act. Thus, for example, the D.C. Circuit has upheld rules providing that local Instructional Television Fixed Service (ITFS) applicants would receive an absolute priority over mutually exclusive non-local applicants, stating:

> The statute does not preclude the FCC from establishing threshold standards to identify qualified applicants and excluding those applicants who plainly fail to meet those standards.... The Commission is surely not obligated to rethink its policies on each occasion that it applies them to a particular set of facts: this would eviscerate the agency's rulemaking authority. Given the absence of disputed factual issues, no *Ashbacker* hearing is necessary. Such a hearing would either require FCC reconsideration of established policy, or else it would be a pointless formality in which the result was preordained.

Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989).

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[11] Our waiver procedure, described *infra*, allows an applicant challenging a renewal applicant to bypass the first step of the two-step procedure.

[12] BellSouth's Petition for Reconsideration at 5.

[13] *Citizens* recognized that the two chief goals in comparative broadcast hearings for initial licenses were: (1) to determine which applicant would provide "the best practicable service to the public" and (2) to determine which applicant will insure the "maximum diffusion of control of the media of mass communications." 447 F.2d at 1207, quoting language from the Commission's 1965 Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393.

[14] We note that nothing discussed here should be construed to affect our broadcast comparative renewal hearing proceedings or standards.

23. Other cases also stand for the general proposition that the Act does not preclude the Commission from establishing, by rule making, threshold standards to identify qualified applicants and to exclude those applicants who plainly fail to meet those standards, even in the face of an explicit statutory hearing requirement. *See, e.g., Public Utilities Commission of State of California v. FERC*, 900 F.2d 269, 278 (D.C. Cir. 1990) ("The *Ashbacker* principle ... requir[es] only that an agency 'use the same set of procedures to process the applications of all *similarly-situated* persons who come before it seeking the same license'") (emphasis in original) and *Altamont Gas Transmission Co. v. FERC*, 965 F.2d 1098, 1100 (D.C. Cir. 1992) ("The express limitation to *bona fide* applications [in *Ashbacker*] implies an agency power to impose a variety of reasonable threshold requirements, not confined to literal want of *bona fides*. To read *Ashbacker* otherwise would improperly curtail the agencies' broad freedom to select their procedures.") (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. 519 (1978)). *See also Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 111 S. Ct. 615, 625-26 (1991) ("Time and again '[t]he Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration.'"); *Nuclear Information Resource Service v. NRC*, 969 F.2d 1169, 1175 (D.C. Cir. 1992) ("Significantly, the Supreme Court has found agency reliance on prior determinations to be perfectly acceptable, even when the statute before it plainly calls for individualized hearings and findings") and *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 409 (D.C. Cir. 1991).[15] Accordingly, we believe our new procedure is lawful and that the court can be persuaded to overrule *Citizens* (if it decided that the case is applicable to cellular renewal hearings).[16]

3. Hearing Procedures

24. We will continue to follow our existing application filing rules[17] which require both renewal applicants and parties filing applications which are mutually exclusive with renewal applications to file their applications during the period extending between thirty (30) and sixty (60) days prior to the expiration date of the relevant cellular license. *See* Section 22.31(j) of our Rules.[18] We have decided to adopt the following rules governing the conduct of comparative cellular renewal proceedings, which will replace the procedures adopted in our Report and Order in this proceeding and embodied in Section 22.942 of our Rules.[19] First, within thirty (30) days of the issuance of the Public Notice announcing the filing of applications competing with a renewal application, the renewal applicant will be required to file its renewal expectancy showing with the Commission and each of its opponents. Interested parties will be allowed thirty (30) days after the renewal applicant has filed its renewal expectancy showing to file petitions directed against any of the applications and the applicants will be allowed fifteen (15) days to file replies to those petitions; no further pleadings will be allowed.

25. Second, after reviewing all of the competing applications for a frequency block in a particular market, the Commission or the staff will designate the applications for

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[15] We note that in *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991), *pets. for review dismissed after remand*, No. 92-1046, slip. op. at 17-18 (D.C. Cir. Jan.26, 1993), the court expressed serious doubt that Section 309 of the Act permits use of a consortium rather than a comparative hearing (or lottery) to choose among mutually exclusive mobile satellite applications and indicated that a "compelling" justification would be required for such a consortium. We believe that decision applies only to the consortium rule at issue, not to the type of bifurcated hearing approach taken here. Thus, in its 1991 decision, the court expressed concern that the Commission had not provided an adequate justification for its abandonment of the hearing approach (928 F.2d at 450) and that the consortium requirement precluded applicants from prosecuting their individual applications at all (928 F.2d at 451). In any event, unlike that case, here we have provided for a two-step hearing and a procedure allowing for waiver of step one of that hearing. We also believe that the public interest reasons for our new rules, set forth above, are in fact compelling.

[16] See the discussion in paragraphs 19-20, *supra*. Some parties herein suggest that the Commission should take the view that *Citizens* was incorrectly decided because it failed to take into account the 1952 amendments to Section 307(d) (now Section 307(c)) of the Act. They argue that these amendments eliminated the statutory requirement that an opportunity be given for the filing of applications which are mutually exclusive with renewal applications, if the incumbent were found to have operated in the public interest. We are not certain that this interpretation is correct. While there is some support for petitioners' interpretation in the hearings leading up to the 1952 amendments, there is no support for this interpretation in the relevant Committee reports. The 1952 amendments to Section 307(d) do, however, support the general proposition that renewal applicants can be evaluated on a "somewhat different basis from new applicants," *NCCB*, 436 U.S. at 810-11, and thus generally support our action here.

[17] In *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, 7 FCC Rcd 3685 (1992) (*Notice of Proposed Rule Making*), we have proposed to change the period during which renewal applications and applications competing with renewal applications may be filed to the thirty-day period prior to the expiration of the license in question. *See* proposed Section 22.145 of our Rules.

[18] Section 22.11(b) of our Rules provides that renewal applications must be filed between the thirtieth and sixtieth day prior to the expiration date of the license sought to be renewed. In our Report and Order, we explained that we would accept renewal and competing applications for cellular radio if they were filed on the thirtieth and sixtieth days prior to expiration of the relevant license, as well as on days between those dates. BellSouth and NewVector request that we amend the wording of Section 22.11(b) to clarify our intent. We deny the petitioners' request. We believe that our explanation of the Rule is sufficient as it stands.

[19] Our revision of former Section 22.942 of our Rules renders moot two objections raised by BellSouth concerning service of pleadings and deadlines for petitions to deny under former Section 22.942. In addition, former Section 22.942(b) of our Rules gave a renewal applicant thirty (30) days after the issuance of a Public Notice announcing the filing of a competing application to file its complete direct case. Southwestern Bell requested that a renewal applicant be allowed 150 days to file its direct case under that former provision. We have taken Southwestern Bell's request into consideration in our revision of Section 22.942 in that we allow all applicants who participate in step two of our two-step hearing procedure 90 days following the Presiding Judge's release of a decision in step one of that proceeding to file their direct cases.

a two-step comparative hearing.[20] Third, an Administrative Law Judge will conduct a threshold hearing, in which both the incumbent and the challengers will be parties, to determine whether the renewal applicant deserves a renewal expectancy.[21] If the Presiding Judge determines that the renewal applicant is due a renewal expectancy, the competing applicants will be found ineligible for further consideration and their applications will be denied. If the Presiding Judge determines that the renewal applicant does not merit a renewal expectancy but is not disqualified on basic qualifications issues, then all the applications filed for that market will be compared in a hearing (step two) which follows the expedited procedures described in Section 22.916(b)(5) through (b)(8) of our Rules.[22] If the Judge issues a ruling in the step one hearing which denies the licensee a renewal expectancy, all the applicants involved in the proceeding will be allowed 90 days after the release of the Judge's ruling in step one to file their direct cases. Rebuttal cases will be filed within 30 days after the filing of the direct cases. The expedited hearing procedures delineated in Sections 22.916(b)(5) through (b)(8) of our rules shall be utilized in comparative cellular radio renewal proceedings.

26. As noted above, the effective date for new Section 22.942 of our Rules, which we adopt today and which implements the two-step procedure, is stayed until this Order is final and no longer subject to judicial review. Thus, renewal applicants and parties filing applications which are mutually exclusive with renewal applications must continue to file those applications within the filing period provided by the Rules, but renewal applicants will not be required to file their renewal expectancy showings until our new version of Section 22.942 of our Rules becomes effective. In addition, during the period of the stay, we will not designate any comparative cellular renewal cases for hearing.[23]

C. Other Matters

1. Reliable Service Areas

27. BellSouth suggests that if the Commission adopts a new standard for establishing a cellular carrier's reliable service area pursuant to its *Further Notice of Proposed Rule Making* in CC Docket No. 90-6, 5 FCC Rcd 6158, we should revise Sections 22.941(b)(1), 22.941(d)(1), and 22.941(d)(2) of the Rules[24] to specify that all comparisons of applicants' areas and populations and applicants' expansion plans will utilize the newly adopted standard, rather than 39 dBu contours. We adopted such a new standard in our *Second Report and Order* in CC Docket No. 90-6, 7 FCC Rcd 2449 (1992) (*Second Report*) and therefore that standard must be utilized to determine all proposed service areas as well as existing service areas. Nevertheless, since Sections 22.941(b)(1) and 22.941(d)(1) of our Rules do not specify the method of determining service areas, we need not change the language of those sections.

28. However, the *Second Report* redefines the actual service areas of licensees and the proposed service areas of applicants as constituting their Cellular Geographic Service Areas (CGSAs). Prior to the *Second Report*, a CGSA was defined as the area within a market which an applicant intended to serve. Therefore, for consistency, we shall reword Section 22.941(d)(2) of our Rules to eliminate the reference to expanding a system's capacity within its CGSA.

2. Consolidated Renewal Proceedings

29. Both BellSouth and NewVector ask that the Commission revise its Rules to permit consolidated renewal proceedings for integrated multi-market cellular systems, noting that even though many cellular systems are operated in an integrated fashion, the individual cellular systems within such "clusters" will in many instances have different license expiration dates which will result in separate comparative renewal proceedings. Petitioners argue that we should adopt a policy that would permit the operators of such multi-market systems to file a consolidated renewal application package on the first-occurring renewal filing date of the licenses involved. Under such a scheme, petitioners contend *inter alia*, that challengers should be considered only if they file for the same cluster of markets, and that the Commission should permit such multi-market consolidated renewal filings only if the licensees involved give the Commission notice of their intent to file on a consolidated basis at least six months prior to the first-occurring license expiration date and such notices are published by the Commission.

30. We reject this proposal for several reasons. First, all of our cellular radio licensees were initially licensed for specific markets and the filing date for each renewal application is based upon a ten-year license period, based on the date the license was granted for that particular market.

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[20] A challenging applicant proposing to provide service that far exceeds service presently being provided by the incumbent licensee may request a waiver of the two-step process. Under such circumstances, there may be no purpose in making a threshold determination as to whether the renewal applicant deserves a renewal expectancy vis-a-vis the competing applicant(s). All requests for waiver of the two-step process by a competing applicant must be fully supported by adequate documentation demonstrating the need for the waiver, including a showing of how the proposed service will far exceed the service presently offered by the incumbent. The Commission, or the staff acting under specific delegated authority for an application, will act upon such a waiver request.

[21] If the order designating applications for hearing specifies any basic qualifying issues against the renewal applicant, these issues will be tried in the step one hearing.

[22] If the designation order specifies any basic qualifying issues against challengers, as opposed to the renewal applicant, those qualifying issues will be tried in the step two hearing.

[23] We followed this general type of procedure when we stayed the effect of a new policy which was in conflict with judicial precedent in *Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, 60 FCC 2d 858, 866 (1976). That policy was eventually affirmed in *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

[24] Section 22.941(b) of the Rules requires a renewal applicant to describe its service area in terms of geographic coverage and population served, as well as the system's ability to accommodate the needs of roamers. Section 22.941(d)(1) provides that applicants will be compared on the basis of the areas and population that each applicant proposes to serve, the relative demand for the services proposed, and the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service. Section 22.941(d)(2) requires that applicants be compared with respect to each applicant's proposal to expand its system capacity in a coordinated manner within its proposed CGSA in order to meet anticipated increasing demand for local and roamer service.

Further, even if licensees of adjacent markets consolidate service in those markets for operational purposes, we have consistently retained separate licenses for each market and still grant modifications for individual licenses in specific markets. Moreover, any transfer of control or assignment of a cellular radio license is granted on an individual market basis. In this regard, any consolidation of markets for operational purposes is viewed as a temporary situation which can be changed at the request of the parties. In short, a challenger may file against one of the licenses held by a consolidated system and any comparative renewal hearing must be based on a specific licensee's past performance in a particular market, not a group of markets.[25]

3. Filing of Exceptions or Appeals

31. BellSouth notes that our Report and Order in this proceeding does not address the filing of exceptions or appeals from Initial Decisions in comparative renewal proceedings. It asks that we adopt the provisions of Section 22.916(b)(9) for comparative cellular renewal proceedings. Section 22.916(b)(9) of our Rules provides that the Common Carrier Bureau has authority to determine, at the time one or more applications are designated for hearing, that exceptions to the Initial Decision of the Administrative Law Judge will be taken directly to the Commission rather than to the Review Board.

32. The introductory paragraph of Section 22.916(b) of the Rules explains that the Rule applies to expedited hearing procedures for the top-30 cellular radio markets. In each of those markets, mutually exclusive applications were designated for hearing, absent a full market settlement. As Section 22.916(c) of the Rules explains, lotteries have been utilized to select the winners among mutually exclusive applications for cellular markets below the top-30 and for Rural Service Areas. We will not be faced with the same situation in comparative renewal proceedings as we encountered in the top-30 markets, where we anticipated comparative hearings for competing non-wireline applicants in each of those markets. At present, we have no reason to believe that the Review Board will be especially burdened with appeals in comparative renewal proceedings. Further, Commission review of litigated cases is accomplished at a reasonable rate. Therefore, we do not perceive a need for a rule authorizing the Common Carrier Bureau to determine, at the time applications are designated for comparative cellular renewal hearings, that exceptions to Initial Decisions should be taken directly to the Commission rather than to the Review Board. If we subsequently wish exceptions to Initial Decisions to be filed with the Commission rather than with the Review Board, we can so specify in the future.

III. ORDERING PARAGRAPHS

33. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by U S WEST NewVector Group, Inc. and BellSouth Corporation, BellSouth Enterprises, Inc., BellSouth Mobility Inc., and American Cellular Communications Corporation ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

34. IT IS FURTHER ORDERED that the amendments to Part 22 made herein ARE ADOPTED and WILL BECOME EFFECTIVE ninety (90) days after publication in the Federal Register, except that the effective date for new Section 22.942 of our Rules IS STAYED until this Memorandum Opinion and Order on Reconsideration is final and no longer subject to judicial review.

35. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Revised Rules

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. 154, 303.

2. Section 22.941 is amended by revising paragraphs (a)(1) and (d)(2) and removing (a)(3) to read as follows:

Section 22.941 Criteria for comparative cellular renewal proceedings.

(a) * * *

(1) Has provided "substantial" service during its past license term. "Substantial" service is defined as service which is sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal.

* * * * *

(d) * * *

* * * * *

(2) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner in order to meet anticipated increasing demand for both local and roamer service;

* * * * *

3. Section 22.942 is revised to read as follows:

Section 22.942 Procedures for comparative renewal proceedings.

The following hearing procedures shall apply to comparative renewal proceedings in the Domestic Public cellular Radio Telecommunications Service:

[25] Of course, the fact that markets have been consolidated for operational purposes under one licensee would be a relevant consideration in evaluating the licensee's past performance.

(a) Within thirty (30) days of the issuance of the Public Notice announcing the filing of a renewal application and applications competing with that renewal application, the renewal applicant must file its renewal expectancy showing. An original and four copies of the renewal expectancy showing must be filed with the Commission and a copy served on each other party to the proceeding.

(b) Interested parties have thirty (30) days from the date that the renewal applicant submits its renewal expectancy showing to file petitions to deny any of the mutually exclusive applications. Applicants have fifteen (15) days to file replies; no further pleadings will be accepted.

(c) In most instances, the renewal application and any competing application(s) will be designated for a two-step hearing procedure. An Administrative Law Judge will conduct a threshold hearing, in which both the licensee and the competing applicants will be parties, to determine whether the renewal applicant deserves a renewal expectancy. If the order designating the applications for hearing specifies any basic qualifying issues against the licensee, those issues will be tried in this threshold (step one) hearing. If the Presiding Judge determines that the renewal applicant is basically qualified and due a renewal expectancy, the competing applicants will be found ineligible for further consideration and their applications will be denied. If the Presiding Judge determines that the renewal applicant does not merit a renewal expectancy but is otherwise qualified, then all the applications filed for that market will be considered in a comparative hearing (step two) which follows the expedited procedures described in Section 22.916(b)(5) through (b)(8) of the Rules.

(d) Any competing applicant which demonstrates that its proposal so far exceeds the service presently being provided, that there would be no purpose in making a threshold determination as to whether the renewal applicant deserved a renewal expectancy vis-a-vis such a competing applicant, may request a waiver of the threshold hearing (step one) of the two-step hearing procedure. The Commission, or the staff acting under specific delegated authority for an application, will act upon such a waiver request prior to designating the relevant applications for hearing.

(e) If the Presiding Judge issues a ruling in the step one hearing which denies the licensee a renewal expectancy, all the applicants involved in the proceeding will be allowed 90 days after the release of the Judge's ruling in step one to file their direct cases. Rebuttal cases must be filed within 30 days after the filing of the direct cases.

(f) The expedited hearing procedures delineated in Sections 22.916(b)(5) through (b)(8) of the Rules shall be utilized in comparative cellular radio renewal proceedings.

APPENDIX B

AMENDED FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and purpose of this action:

This *Memorandum Opinion and Order on Reconsideration* amends certain rules governing the conduct of comparative renewal hearing proceedings in the Domestic Public Cellular Radio Telecommunications Service (cellular radio service). The new rules adopted in this proceeding further our objective of providing effective and adaptive regulation for communications.

II. Summary of the issues raised by the public comments asking for reconsideration of the *Report and Order* herein:

Several commenters suggested modifications of the Commission's standards for awarding renewal expectancies and for conducting hearings. As a result, we have made some revisions of those standards.

III. Significant alternatives considered:

The *Report and Order* in this proceeding adopted several rules for which no petitions for reconsideration have been filed. The petitions for reconsideration of the *Report and Order* focused on the question of whether the Commission should adopt a two-step hearing procedure. This procedure would allow the Commission to determine in a threshold hearing whether a renewal applicant's past record of performance justifies granting it a major preference known as a renewal expectancy. If the Commission grants a renewal expectancy to the incumbent licensee, the licensee's renewal application would be granted and no further hearings would be conducted. If the licensee's record did not justify renewal, its application would be designated for hearing with competing applications. The two-step procedure also allows a challenging applicant to seek a waiver of the threshold hearing. After careful analysis, the Commission determined that the two-step procedure would serve the public interest because it would streamline what would otherwise be a potentially lengthy and expensive hearing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of the Bell Atlantic
Telephone Companies to Normalize
Financial Reports

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1993; Released: April 16, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 11, 1992, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a pleading captioned "Petition to Normalize Financial Reports." In its petition, Bell Atlantic requests permission to "normalize," or adjust, its earnings results for the 1990 and 1991 calendar years to correct for what it claims to be a mismatch of approximately $17.6 million between expenses and revenues which occurs due to the annualized rate treatment of certain exogenous costs. Under Bell Atlantic's proposal, revenues now recorded in 1991 would shift back to the 1990 earnings period. If Bell Atlantic's petition is granted, its revenue sharing requirement for the current tariff year would be reduced from $22.2 million to approximately $6.4 million. We are denying Bell Atlantic's petition, for the reasons stated below.

II. BACKGROUND

2. The phenomenon Bell Atlantic identifies results from the interaction of several different policy decisions made in the *LEC Price Cap Order*. [1] In that order, the Commission required price cap LECs to treat cost changes incurred by modifications made by the Commission to Parts 32 and 36 as exogenous adjustments to their price cap indexes.[2] The impact of these cost changes on annual rates is recorded through annual adjustments to the price cap indexes on July 1 of each year, rather than when they actually occur. Also in the *LEC Price Cap Order*, the Commission established a revenue sharing program which required LECs to share excess earnings with ratepayers. The tariff year begins on July 1, however, whereas the year on which sharing is based begins on January 1. Thus, rates change on July 1 of each year, even though expenses do not change until January 1 of the following year. As a result of these policy decisions, a carrier whose exogenous costs decrease from one year to the next will appear to overearn in the first half of the calendar year, and will appear to underearn in the second half. These "mismatched" factors affect all LEC price caps similarly, although the level of expenses and revenues vary.

3. Bell Atlantic asserts that failure to normalize earnings will cause its 1991 earnings to be erroneously overstated, which would lead to an overstatement of its sharing obligation under the price cap rules. It claims to be unique among price cap carriers in this respect, arguing that its transitional support (TRS) contributions are consistently large relative to others in the industry.[3] It also claims that the annualized rate treatment of inside wire (ISW) amortization, subscriber plant factor phasedown (SPF), dial equipment minute transition (DEM), and TRS amounts will continue to cause mismatches between revenues and expenses through the 1992/1993 tariff year.[4] It argues for similar normalization treatment of those mismatches.[5] Finally, it proposes application of a four-step methodology to normalize its revenues.[6]

4. On April 15, 1992, the Common Carrier Bureau released a public notice seeking comment regarding the advisability of normalization and possible normalization methodologies, including Bell Atlantic's proposal.[7] Comments were filed on May 5, 1992 by the Ameritech Operating Companies (Ameritech), American Telephone and Telegraph Company (AT&T), BellSouth Corporation and BellSouth Telecommunications, Inc. (BellSouth), GTE Service Corporation (GTE), MCI Telecommunications Corporation (MCI), Pacific Bell (Pacific), and US West Communications, Inc. (US West). Reply comments were filed on May 15, 1992 by Bell Atlantic, MCI, Pacific, the Southern New England Telephone Company (SNET), and the Southwestern Bell Telephone Company (SWB).

III. ISSUES ANALYSIS

5. We will treat the Bell Atlantic filing as a petition for waiver, as there is no provision in the Commission's Rules

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[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990)(*LEC Price Cap Order)*, modified on recon. 6 FCC Rcd 2637 (1991), further modified on recon. 6 FCC Rcd 4524 (1991), appeal docketed, D.C. PSC v. FCC, No. 91-1279 (C.C. Cir. June 14, 1991).

[2] These cost changes are ISW amortization, SPF, DEM and TRS amounts. The terms are defined in paragraph 3 of this order.

[3] Bell Atlantic Petition at 3 n.7.

[4] *Id.* at 3-5.

[5] *Id.* at 5 n.11.

[6] *Id.* at 1-1 and 1-2.

[7] *See* Common Carrier Bureau Solicits Comments Regarding Normalization of Earnings Reported on Form 492 for Computation of Sharing Under Price Caps, Public Notice, 7 FCC Rcd 2735. As an alternative to Bell Atlantic's proposal, the Bureau sought comment on application of the normalization method required of reserve deficiency (RD) and ISW amortization amounts in the *LEC Price Cap Reconsideration Order*. Parties were also asked to comment on applying the Bureau's suggested alternative deferral and amortization methodology in order to normalize the types of costs cited by Bell Atlantic. Finally, they were asked to assess the advisability of retroactively reflecting this alternative method in these areas in the revised FCC Form 492 reports from July 1, 1990. Because we are denying Bell Atlantic's petition, comments concerning the different methodologies are not addressed in this order.

concerning a "Petition to Normalize."[8] Carriers file reports regarding their interstate rates of return on FCC Form 492 as required by Part 65 of the Commission's Rules. Those reports are filled out pursuant to instructions printed on the back of the form itself. These instructions, adopted as part of the form, would have to be waived to give Bell Atlantic the relief it seeks. The rules may be waived if there is "good cause" to do so.[9]

6. Most of the parties oppose universal application of Bell Atlantic's normalization proposal. They contend that requiring all LECs to normalize costs after the fact would be unfair, since the companies made their business decisions based on the rules then in effect.[10] The LECs also argue that adopting Bell Atlantic's suggestion would change the initial rates -- which the Commission found reasonable -- for all LECs under price cap regulation.[11] Further, they maintain, although annualized treatment was established in the price cap rules to avoid rate churn, granting Bell Atlantic's petition would increase rate churn.[12] MCI contends that the problem of excessive rate churn for access customers would worsen if other LECs are allowed to normalize their earnings.[13] Bell Atlantic, however, replies that normalization would not cause excessive rate churn because rates usually change at the time of the annual filing as a matter of course.[14]

7. Other commenters contend that Bell Atlantic is not affected differently from other LECs. They charge that Bell Atlantic's overearnings were caused by changes in expenses and revenues which occur during the normal fluctuations in a tariff period caused by economic conditions, number of business days, seasonal factors, and the change in the allowed rate of return.[15] They agree with Bell Atlantic that the mismatch affects all carriers to some extent, but argue that the mismatch is declining and ceases to exist after the 1993 annual access filing, when the Commission's SPF, DEM and TRS requirements end.[16] Bell Atlantic admits that the mismatch was not the sole cause of its 1991 overearnings, but adds that the mismatch contributed substantially to its 1991 overearnings.[17]

8. We conclude that Bell Atlantic has not shown good cause for granting its waiver. Bell Atlantic has not demonstrated that it has been affected more severely than other price cap LECs by the mismatch. Although Bell Atlantic argues that its mismatch is caused chiefly by its $29 million TRS contribution, its mismatch is actually caused chiefly by its ISW amortization methods.[18]

9. The Bureau's analysis shows that most of Bell Atlantic's overearnings can be attributed to its ISW amortization methodology. When the Commission mandated annualized treatment of the exogenous changes for reserve deficiency and ISW amortizations, it noted that this might result in a mismatch between expenses and revenues. As a preventative measure, it directed the exchange carriers subject to price caps to normalize these amortizations by booking to Account 1439, Deferred Charges, the excess amortization expenses during the amortization period, and expensing the deferred amount over the remainder of the tariff year.[19] Bell Atlantic, however, did not spread its ISW costs over the entire 1991 calendar year. Rather than using data from the entire year, Bell Atlantic reported an amortization amount in its initial Form 492 which was computed using only six months' data. Had it used data from the entire year, its sharing amount would have been less than it has estimated. Bell Atlantic's difficulty is not caused by Commission requirements, as Bell Atlantic claims, but rather, by its own accounting methods. [20] Consequently we find that Bell Atlantic has failed to show good cause to waive the instructions governing completion of this Form 492 for 1990 and 1991.

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[8] Several parties raise procedural objections to the Bell Atlantic petition, arguing that Bell Atlantic raised similar issues in a previous petition, and that the petition now before us is a procedurally defective attempt to change the rules. *See, e.g.*, Ameritech Comments at 2-3; BellSouth Comments at 2; MCI Comments at 3; US West Comments at 2, 4. Bell Atlantic, however, seeks a waiver of the Commission's Form 492 filing requirements, not an amendment of the rules.

[9] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. Sec. 1.3. Good cause exists if application of the rules to particular facts produces results that were not anticipated when the rules were adopted, those results impose an undue hardship upon particular persons, and a decision to grant the waiver does not conflict with the purposes and policies of the relevant rules. *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[10] *See, e.g.*, Ameritech Comments at 1; GTE Comments at 2; Pacific Comments at 2; US West Comments at 6-7; Pacific Reply at 1-2. They request that normalization, if granted, be restricted to Bell Atlantic and other parties specifically seeking a waiver. AT&T, on the other hand, urges that whatever position the Bureau adopts be applied to all LECs to ensure that they fulfill their sharing obligation. AT&T Comments at 2

[11] US West Comments at 3-5; SNET Reply at 2-3, *citing LEC Price Cap Order*, 5 FCC Rcd at 6814.

[12] BellSouth Comments at 2; MCI Comments at 6-7. Requiring normalization would oblige the LECs to restate their earnings amounts each year to capture the second half of the previous year. Restating their earnings each year, they claim, would cause rate churn.

[13] MCI Comments at 7.

[14] Bell Atlantic Reply at A-4.

[15] Ameritech Comments at 3-4; MCI Comments at 9. Ameritech claims that, but for the effects of the Interexchange category, Bell Atlantic would have reported an approximate rate of return of 12.14 percent. Data filed with the Commission in ARMIS confirm that overearnings are primarily in the Interexchange basket, which is unaffected by the costs Bell Atlantic seeks to normalize.

[16] US West Comments at 5-6; SNET Reply at 3. The phase-down associated with these exogenous cost adjustments expire at the end of June, 1994, *see* Section 69.612 of the Commission's Rules, 47 C.F.R. § 69.612.

[17] Bell Atlantic Reply at A-3.

[18] Bell Atlantic claims that it must normalize to correct for a mismatch between costs and revenues that is caused chiefly by its large TRS contribution. However, other LECs that contribute or receive TRS amounts as large as Bell Atlantic's $29 million contribution -- for example, in 1992, Ameritech's TRS contribution was $30 million, and GTE and BellSouth received TRS payments of $31 million and $22 million, respectively -- do not wish to normalize. These parties oppose Bell Atlantic's petition.

[19] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2676.

[20] We direct Bell Atlantic to change its treatment of the ISW amortization in its final Form 492 for 1991 to conform to the *LEC Price Cap Reconsideration Order*. To avoid the rate churn which would occur if Bell Atlantic recorded this change after July 1, 1993, we direct it to revise its annual access filing to reflect this revision by May 3, 1993.

IV. CONCLUSION AND ORDERING CLAUSE

10. We have reviewed the comments, the replies, and the supporting materials filed by the parties to this proceeding. We deny the Bell Atlantic petition to normalize for the reasons stated above.

11. ACCORDINGLY, IT IS ORDERED that the petition to normalize financial reports, filed by Bell Atlantic Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Profit Enterprises, Inc.
Monrovia, California

NAL Acct. # 215HF0069

FORFEITURE ORDER

Adopted: March 17, 1993; **Released: April 15, 1993**

By The Commission:

I. INTRODUCTION

1. The Commission has before it a Notice of Apparent Liability (NAL) adopted on March 20, 1992, and released on April 24, 1992, and Profit Enterprises Inc.'s response thereto. The NAL in the amount of $10,000 was issued to Profit Enterprises, Inc. pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §503(b), for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. §302(b), and Section 2.803 of the Commission's Rules, 47 C.F.R. §2.803. *See Profit Enterprises, Inc.*, 7 FCC Rcd 2547 (1992). In its response, Profit Enterprises Inc. urges the Commission to mitigate the amount of the forfeiture the Commission has proposed to issue to its company.

2. For the reasons set forth below, we reject the arguments made by Profit, and have determined that the appropriate amount of the forfeiture in this case is $10,000.

II. BACKGROUND

3. Profit Enterprises Inc., (Profit) a manufacturer and distributor of personal computers, sold three 286-16 MHz personal computers, Class B digital devices, for which no equipment authorization had been granted, and which were labled with an invalid identification number, all in violation of the requirements of Sections 15.3 and 15.101(a) of the Rules, 47 C.F.R. §§15.3, 15.101(a).

III. DISCUSSION

4. Profit argues that it did not knowingly violate the Rules, since it sells only "components" and not "systems," and therefore thought FCC Rules inapplicable because Profit had assembled "the mother board and power supply." Profit also requests leniency from the Commission on the basis that it is a small company and "cannot afford costly mistakes such as this."

5. Under the Communications Act and the Commission's Rules, Profit's prior knowledge or understanding of the law is unnecessary to a determination of whether a violation existed. Under Section 15.101(c) of the Rules, 47 C.F.R. § 15.101(c), "[p]ersonal computer mother boards (the circuit board performing the central processing) that are marketed assembled with an enclosure and a power supply must be certificated with that enclosure and power supply." The Commission also does not consider ignorance of the law a mitigating factor. *See Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991). In the instant case, the Commission made a determination that Profit's action also appeared intentional, not simply willful, as was evidenced by the fact that the invoices were for the purchase of three computers, and that Profit affixed invalid identification labels to the uncertified equipment.

IV. CONCLUSION

6. Profit does not challenge the facts of this case, but simply pleads ignorance of the law and requests leniency on the basis that the Company "cannot afford costly mistakes such as this." Although it is the Commission's policy to consider mitigating factors in connection with requests to reduce or rescind forfeitures, Profit has not raised any arguments or submitted any evidentiary information which would warrant mitigation. *See Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

7. The appropriate amount for this forfeiture is therefore $10,000. No further adjustments appear warranted.

V. ORDERING CLAUSES

8. Accordingly, pursuant to Section 503(b) of the Communications Act, IT IS ORDERED, that Profit Enterprises, Inc. FORFEIT to the United States the sum of ten thousand dollars ($10,000) for willful violation of Section 302(b) of the Communications Act, and Section 2.803 of the Commission's Rules.

9. IT IS FURTHER ORDERED that Profit Enterprises shall make such payment within 30 days of receipt of this Order. Payment should be made by check or money order payable to the Federal Communications Commission. Please place NAL/Acct. No. 215HF0069 on the remittance.

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Profit Enterprises.

11. Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. §504(a).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of NAL Acct. No. 215HF0065
Donald W. Bishop
Overland Park, Kansas

FORFEITURE ORDER

Adopted: March 17, 1993; Released: April 15, 1993

By The Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Reconsideration (Petition) urging the Commission to mitigate the amount of the forfeiture the Commission has proposed to issue to Donald W. Bishop in its Notice of Apparent Liability (NAL) issued on April 24, 1992. *See Donald Bishop*, 7 FCC 2546 (1992).

II. BACKGROUND

2. The NAL in the amount of $10,000 was issued to Mr. Bishop pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §503(b), for operating an unlicensed radio station on 7420 kHz, 7417.9 kHz, and 15050.2 kHz in violation of Section 301 of the Act, 47 U.S.C. §301.[1]

3. On October 6, 1991, Commission staff operating the Commission's long range, High Frequency Direction-Finding Network intercepted Mr. Bishop's transmission on the above referenced frequencies operating from a mobile vehicle. After tracking Mr. Bishop's vehicle through several states, Commission investigators inspected the vehicle. Mr. Bishop, who was operating the vehicle, admitted at that time that he had been responsible for the transmissions.

III. DISCUSSION

4. Petitioner argues that the amount of the forfeiture should be reduced because it is illogical to increase a forfeiture from the base amount because of the intentional nature of the violation when the forfeiture amount is already based upon a violation which requires a showing of its intentional nature. The Commission, Petitioner argues, must prove *intent* in cases where the violation is not repeated because "intent is an essential element of all demands for forfeiture for singular acts..." *See Petition*, p.1.

5. Petitioner's argument confuses the threshold showing of "willfulness" needed to establish a violation, and the upward adjustment criteria of intentional wrongdoing. As explained in the Conference Report to the 1982 Amendment of the Communications Act, 47 U.S.C. §312(f): "willful... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate the Act or Commission rules." *See Southern California Broadcasting Company*, 6 FCC Rcd 4386 (1991). The forfeiture was issued to Petitioner for violating Section 301 of the Act. Operating a radio facility without a license when a license is required for its operation is deemed willful in the sense that the wrongdoer intended to transmit (as distinguished from an accidental transmission). Knowledge of the legal nature of the action, although relevant to the issue of degree of culpability, is not dispositive of the issue of willfulness. Since petitioner readily acknowledged that he was responsible for the transmissions, his actions were deemed willful. The Commission also considered the fact that Petitioner, a contributor or editor of several land mobile publications who had written about the problem of unlicensed broadcast operations (known as "pirate radio" operations), also had a higher level of knowledge or awareness of the law, and to that extent a greater degree of culpability for the offense.[2]

6. Petitioner also argues that his history of overall compliance should have been considered pursuant to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on reconsideration*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA V. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement*). He argues that a 20% downward adjustment is warranted and that we should have applied this downward adjustment criteria in determining the appropriate amount of the forfeiture. Since Commission records do not disclose any history of violations nor warnings or other evidence of non-compliance, we will adjust the amount of the forfeiture accordingly.

7. Finally, Petitioner also argues that the Commission is inconsistent in its application of adjustment criteria. Petitioner asserts that the $8,000 forfeiture for unlicensed operation levied by the Commission in *Roberto Pizano*, 7 FCC Rcd 2571 (1992), should have been upwardly adjusted for the repeated nature of his violation and because Mr. Pizano had a prior violation. In addition, Petitioner argues that the fact that no upward adjustments for "intent" or "willfulness" were made in such cases as *Prime Portable Manufacturer, Inc.*, 7 FCC Rcd 2399 (1992) and *Artdex*

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[1] As explained in paragraph 7 of the NAL, the amount of the forfeiture was increased because of the intentional nature of the violation. *See* 7 FCC Rcd at 2546.

[2] With respect to the Commission's consideration of this factor, Petitioner argues that the Commission's focus on his employment and reference to the unlawful operations as "pirate radio" operations in a news release of the Commission's action were part of a "media campaign" and attempt to pillory him. As discussed above, Petitioner's employment and writings for trade publications was used as evidence indicative of his knowledge of the problem of illegal broadcast operations to show the intentional and egregious nature of the violation. Further, Petitioner was in no way singled out for any "media campaign". It is the Commission's practice to issue news releases of actions taken in "pirate radio" cases for violation of Section 301 of the Act. Such press releases help the Commission to deter other potential violators. We therefore reject Petitioner's argument that the amount of the forfeiture should be adjusted downward to compensate Petitioner for the "harm" caused him by press accounts of the Commission's action.

Computer Corporation, 7 FCC Rcd 2401 (1992), is further evidence of the Commission's uneven approach to levying forfeitures.[3]

8. Petitioner's reliance on the Commission's decision in *Pizano* is misplaced. Contrary to Petitioner's assertion, there was no conclusive evidence that Mr. Pizano had repeatedly operated in violation of the rules, so the Commission could not upwardly adjust the forfeiture for repeated violations. Mr. Pizano was cited for the one operation which the Commission intercepted and which Mr. Pizano also admitted to making. Moreover, Petitioner is incorrect in his assertion that the Commission had evidence that Mr. Pizano had previously violated the same rule. The Commission's decisions in *Prime Portable Manufacturer, Inc.* and *Artdex Computer Corp.* are also consistent with its *Policy Statement*. The records in these two cases did not demonstrate bases upon which to upwardly adjust the forfeitures for violations of an intentional nature. Instead, in each case, the Commission took into account that the entity involved had apparently violated the Commission's computer marketing rules before, and upwardly adjusted the forfeiture to $10,000 on that basis. Finally, as stated in the *Policy Statement*, and recently reemphasized on reconsideration, the *Policy Statement* is not meant to be a binding rule so much as a guideline in deciding the appropriate amount of forfeitures to be issued generally. *See* 7 FCC Rcd at 5339. The Commission retains discretion regarding imposition of forfeitures in specific situations.

IV. CONCLUSION

9. Petitioner has shown that his prior history of compliance with Commission rules entitle him to a downward adjustment of the forfeiture amount. Section 1.80(b)(4) states that in determining the amount of the forfeiture, the Commission must consider "the nature, circumstances, extent and gravity of the violations and, with respect to a violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." This Rule requirement is reflected in the Commission's policy guidelines for the assessment of forfeitures. *See Policy Statement*. For the foregoing reason, we are adjusting the amount of the forfeiture by 20% or $2,000.

V. ORDERING CLAUSES

10. Accordingly, pursuant to Section 503(b) of the Communications Act, IT IS ORDERED, that Donald W. Bishop, of Overland Park, Kansas, FORFEIT to the United States the sum of eight thousand dollars ($8,000) for operating an unlicensed station in violation of Section 301 of the Communications Act.

11. IT IS FURTHER ORDERED that payment must be made within 30 days of receipt of this Order. Payment should be made by check or money order payable to the Federal Communications Commission, must include NAL/Acct. No. 215HF0065, and must be mailed to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

12. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Donald W. Bishop.

13. Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C.§504(a).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[3] Petitioner, citing the Commission's *Memorandum Opinion and Order*, in a complaint filed by Lee Richter, d/b/a/ Nu-Page of Winder against Digital Paging Systems of Georgia, advances the argument that remedial action taken by him "in refraining from further operations" should be considered in determining, and mitigating, the amount of the forfeiture. We reject Petitioner's argument. Petitioner is essentially asking the Commission to mitigate forfeitures on the basis that a licensee refrains from further violating the rules. Even affirmative remedial action cannot generally form a basis for mitigation of a violation. *See Station KGLV, Inc.*, 42 FCC 2d 258, 259 (1973). Further, the case cited by Petitioner is wholly inappropriate. The *Nu Page* complaint involved a determination regarding the use of a shared frequency in the private radio service. Critical to the determination of whether or not there had been a violation of the rules was the issue of whether the parties sharing the frequency had fully cooperated in resolving the interference. The law and facts in that case are, therefore, inapposite to this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-62

In the Matter of

Guidelines for Evaluating the
Environmental Effects of
Radiofrequency Radiation

NOTICE OF PROPOSED RULE MAKING

Adopted: March 11, 1993; Released: April 8, 1993

Comment Date: August 13, 1993
Reply Date: September 13, 1993

By the Commission: Commissioner Marshall not participating; Commissioner Duggan issuing a statement.

INTRODUCTION

1. By this action, we are proposing to amend and update the guidelines and methods used for evaluating the environmental effects of radiofrequency (RF) radiation from FCC regulated facilities. Specifically, we are proposing to use the new standard for RF exposure recently adopted by the American National Standards Institute (ANSI) in association with the Institute of Electrical and Electronic Engineers, Inc. (IEEE), ANSI/IEEE C95.1-1992.[1] This standard was adopted by ANSI on November 18, 1992, and is generally more restrictive than the 1982 ANSI standard, ANSI C95.1-1982, that is specified currently in our rules for evaluating the environmental effects of RF radiation.[2] This proposal could affect a wide variety of radio services, e.g., AM, FM, and TV broadcast services; common-carrier land-mobile services; and private-radio land-mobile services.[3]

BACKGROUND

2. The National Environmental Policy Act of 1969 (NEPA) requires federal agencies to evaluate the effects of their actions on the quality of the human environment.[4] To meet its requirements under NEPA, the Commission has adopted rules for evaluating the environmental impact of its actions.[5] One of the environmental factors considered under these rules is human exposure to RF radiation from FCC-regulated transmitters and facilities.

3. In 1985, the Commission adopted the 1982 ANSI guidelines for use in evaluating the effects of RF radiation exposure on the environment.[6] The Commission found that these guidelines were widely accepted technically and would meet its needs for evaluating environmental RF radiation. The 1982 ANSI RF exposure guidelines were developed by a panel of experts based on the best scientific information available at the time concerning safe levels of exposure to RF radiation for workers and the general public.

4. The Commission's rules now require applicants for certain facilities to prepare an Environmental Assessment (EA) if the transmitter or facility in question would expose the general public or workers to RF levels in excess of those recommended by the 1982 ANSI guidelines.[7] Examples of facilities which have the potential to cause exposures in excess of these guidelines include: radio and television broadcast stations; satellite uplinks; FM booster and translator stations transmitting in excess of 100 watts; and MDS and ITFS stations transmitting in excess of 200 watts.[8] The rules also address other related matters such as the evaluation of multiple transmitter sites.[9]

5. Many low-power, intermittent, or normally inaccessible RF transmitters and facilities have been categorically excluded from our rules regarding RF radiation evaluation based on calculations and measurement data indicating that they would not cause exposures that would violate the ANSI guidelines under normal and routine conditions of use.[10] The Commission has "categorically excluded" such classes of transmitters from routine environmental evaluation with respect to RF radiation.[11] Examples of currently excluded transmitters and facilities include: private land-mobile, cellular radio, and amateur radio stations. These

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[1] *See* ANSI/IEEE C95.1-1992 (previously issued by IEEE as IEEE C95.1-1991), "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz," approved September 26, 1991 by IEEE, published April 27, 1992 by IEEE. To purchase copies from the IEEE, telephone: (800) 678-IEEE. Adopted by ANSI November 18, 1992. To purchase copies from ANSI telephone (212) 642-4900. See paragraph 34, *infra*, for information on reviewing this document at the Commission.

[2] *See* ANSI C95.1-1982, "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," American National Standards Institute, New York, NY. ANSI is a non-profit, privately funded, membership organization that coordinates the development of voluntary national standards in the United States. ANSI has a membership composed of over 1200 companies, 250 professional, technical, trade, labor, and consumer organizations, and approximately 30 government agencies.

[3] See Appendix B for a discussion of possible impact of the Commission's adoption of the new ANSI/IEEE guidelines.

[4] National Environmental Policy Act of 1969, 42 U.S.C. Section 4321, *et seq*.

[5] *See* 47 CFR Section 1.1301, *et seq*.

[6] *See Report and Order*, in Gen. Docket No. 79-144, 100 FCC 2d 543 (1985) and *Memorandum Opinion and Order*, 50 Fed. Reg. 38653, 58 RR 2d 1128 (1985).

[7] 47 CFR Section 1.1307(b).

[8] *Id*., Note 1.

[9] *Id*., Note 2.

[10] *See Second Report and Order*, in Gen. Docket No. 79-144, 2 FCC Rcd 2064 (1987); and *Erratum*, 2 FCC Rcd 2526 (1987).

[11] The Council on Environmental Quality, which has oversight responsibilities with regard to NEPA, permits federal agencies to categorically exclude certain action from routine environmental processing when the potential for individual or cumulative environmental impact is judged to be negligible. *See* 40 CFR §§1507, 1508.4; *see also*, Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 43 Fed. Reg. 55,978 (1978). In response to this provision,

exclusions were based primarily on considerations regarding the excluded transmitters' relative low operating power, intermittent operation or inaccessibility.[12]

6. On November 18, 1992, ANSI adopted a new standard for RF exposure, designated ANSI/IEEE C95.1-1992. This new standard contains a number of significant differences from the guidelines and recommendations issued by ANSI in 1982.[13] In many respects the 1992 guidelines are more restrictive in the amount of environmental RF exposure permitted, and they also extend the frequency range under consideration to cover frequencies from 3 kHz to 300 GHz. The new 1992 guidelines specify two sets of exposure recommendations, one for "controlled environments" (usually involving workers) and another for "uncontrolled environments" (usually involving the general public). The 1982 guidelines specified only one set of exposure limits, regardless of whether the individual exposed was a worker or a member of the general public.

7. The 1992 guidelines also, for the first time, include specific restrictions on currents induced in the human body by RF fields. In addition, the guidelines contain significant changes in allowable exclusions and power levels permitted for certain low-power devices, such as hand-held radiotelephones and cellular radios. For example, the 1982 guidelines permit exclusion if the input power of the radiating device at frequencies between 300 kHz and 1 GHz is seven watts or less. The 1992 guidelines would reduce this power exclusion significantly for devices that operate in uncontrolled environments and for devices that operate on frequencies above 450 MHz in controlled environments. The 1992 guidelines also contain a further restriction that would not permit the application of the power exclusion to hand-held devices where the radiating structure is maintained at 2.5 cm or less from the body.

DISCUSSION

8. The Commission's environmental rules are intended to ensure that, consistent with NEPA, any FCC-regulated transmitters and facilities that expose the public or workers to levels of RF radiation that are considered by expert organizations to be potentially harmful undergo environmental processing. The Commission, however, is not the expert agency for evaluating the effects of RF radiation on human health and safety.[14] Therefore, it uses standards and guidelines developed by those with appropriate expertise. As noted above, since 1985, the Commission has relied on the 1982 ANSI RF exposure guidelines in connection with its responsibilities under NEPA regarding the evaluation of potential RF environmental hazards.

9. As part of its procedures for periodically reevaluating its standards ANSI has recently approved a new RF exposure standard, in association with the IEEE, that is based on additional research and study in the area of RF effects. In view of ANSI's adoption of this revision of the 1982 RF exposure guidelines, we believe that it is now incumbent upon us to consider updating the RF exposure standards specified in our rules. We are, therefore, proposing to replace the 1982 ANSI guidelines with the new 1992 ANSI/IEEE guidelines (ANSI/IEEE C95.1-1992) for purposes of evaluating environmental significance.[15] These new guidelines are more up to date with respect to scientifically-based criteria for use in evaluating human exposure to RF radiation. They will ensure that FCC-regulated facilities comply with the latest safety standards for RF exposure.

10. As noted above, the 1992 ANSI/IEEE guidelines contain significant differences from the guidelines currently used by the Commission. We recognize that evaluating the biological effects of RF and microwave energy is a complex and controversial subject and that the adoption of new guidelines will raise a number of issues and implementation concerns. These include among other things: the definitions of "controlled" and "uncontrolled" environments; new requirements regarding induced and contact RF currents; discontinuities in exposure restrictions in the FM broadcast band; differences between the new guidelines and other RF exposure guidelines; treatment of hand-held devices; and the impact on existing facilities and devices. These matters are discussed below, and we invite comments regarding them.

11. We also intend to solicit comments from expert health and safety agencies within the Federal Government, including the U.S. Environmental Protection Agency, the Food and Drug Administration, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health. In addition, we plan to confer with the National Telecommunications and Information Administration (NTIA) of the U.S. Department of Commerce, in the interest of developing a consistent approach to the treatment of RF exposure environments for the private sector and Federal Government. NTIA has responsibility for authorizing and managing the Federal Government's use of the RF spectrum.

Definition of "Controlled" and "Uncontrolled" Environment

12. The 1992 ANSI/IEEE guidelines specify two sets of exposure recommendations, those for "controlled environments" (usually involving workers) and those for "uncontrolled environments" (usually involving the general public). The ANSI/IEEE standard states that "|c|ontrolled environments are locations where there is exposure that may be incurred by persons who are aware of the potential for exposure as a concomitant of employment, by other cognizant persons, or as the incidental result of transient

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the Commission categorically excluded a number of types of facilities. *See Second Report and Order*, in Gen. Docket No. 79-144, 2 FCC Rcd 2064 (1987); and *Erratum*, 2 FCC Rcd 2526 (1987).

[12] Even with respect to facilities that are otherwise categorically excluded from RF environmental processing, such facilities may, if the circumstances so warrant in a particular case, be subject to the Commission's environmental rules. *See* 47 CFR §1.1307(c) and (d).

[13] For comparison purposes, a summary of major sections of the 1982 and 1992 RF exposure guidelines and exclusions is contained in Appendix A.

[14] *See, e.g., Report and Order*, in Gen. Docket No. 79-144, 100 FCC 2d at 560.

[15] By this proposal, we are not intending to supersede any other federal requirements that RF devices may also be required to comply with. For example, this action does not affect any compliance requirements for microwave ovens with respect to emission standards established by the Center for Devices and Radiological Health of the U.S. Food and Drug Administration.

passage through areas where analysis shows the exposure levels may be above [the exposure and induced current levels permitted for the general public but not those permitted for persons aware of the potential for exposure]." "Uncontrolled environments" are, "locations where there is the exposure of individuals who have no knowledge or control of their exposure. The exposures may occur in living quarters or workplaces where there are no expectations that the exposure levels may exceed [the exposure and induced current levels permitted for the general public]."

13. Within the general guidance of the definitions of a controlled and an uncontrolled environment, there will be situations where specific determinations must be made as to which definition will apply. We request comment on the criteria to be applied in determining which exposure limits would apply to the various radio operations authorized by the Commission. In general, we believe that because matters of possible health and safety are involved, a conservative approach is appropriate with regard to the evaluation of the effects of RF exposure. Accordingly, where there is any question of possible exposure of the general public (which might include non-technical employees) to RF radiation, we propose to apply the more conservative guidelines for uncontrolled environments. Therefore, the guidelines for uncontrolled environments would apply to any transmitters and facilities that are located in residential areas or locations where proximity to the RF source may be unrestricted.[16] Similarly, we would apply the controlled guidelines to those situations where exposure is incidental and transitory, or the exposure is incurred in areas where personnel are aware of the exposure potential.

Low Power Devices/Exclusions

14. Both the 1982 ANSI and 1992 ANSI/IEEE guidelines provide exclusions for cases where the protection guidelines, or field strengths, may be exceeded with respect to low power devices. These exclusions are intended to apply to devices such as, "hand-held, mobile, and marine radio transceivers."[17] The 1982 ANSI guidelines specify an exclusion if it can be shown by laboratory procedures that the exposure conditions do not exceed a certain specific absorption rate (SAR) or, alternatively, if "the radio frequency input power of the radiating device is seven watts or less."[18] The new 1992 ANSI/IEEE guidelines also contain exclusions for low-power devices. However, the new exclusions are generally more restrictive and contain standards for both controlled and uncontrolled environments. They also define the power exclusion in terms of "radiated power" rather than "input power" as in the 1982 ANSI guidelines.

15. The 1992 ANSI/IEEE guidelines provide an exclusion based on certain SARs or on the radiated power of the low power device.[19] In controlled environments, the standard permits exclusion at frequencies between 100 kHz and 450 MHz if the radiated power of the device is seven watts or less. At frequencies between 450 and 1500 MHz, the radiated power must be limited to 7(450/f) watts where f is the frequency in MHz for exclusion. In uncontrolled environments, the standard permits exclusion at frequencies between 100 kHz and 450 MHz if the radiated power of the device is 1.4 watts or less. At frequencies between 450 and 1500 MHz, the radiated power must be limited to 1.4(450/f) watts where f is the frequency in MHz.[20] However, the new 1992 ANSI/IEEE guidelines state that the exclusions based on radiated power do not apply to devices with the radiating structure maintained within 2.5 cm of the body.

16. We are proposing to adopt the exclusions for low-power devices provided in the new 1992 ANSI/IEEE guidelines.[21] As indicated above, we will consider that hand-held portable devices, such as cellular telephones, must comply with the requirements specified for uncontrolled environments.[22] Categorical exclusions can be based on either radiated power or specific absorption rate (SAR). Therefore, even if a low-power device does not comply with ANSI/IEEE guidelines with respect to radiated power, it may alternatively comply with the ANSI/IEEE guidelines for SAR. Compliance with the latter guidelines can be demonstrated through appropriate laboratory measurements.

17. As stated above, we note that under the ANSI/IEEE guidelines exclusions based on radiated power would not apply when the "radiating structure" is within 2.5 cm of the body. We also note that the radiating structure may include parts of the device other than the antenna itself. In these cases manufacturers may instead demonstrate by appropriate measurements that a particular device complies with the exclusion guidelines that are based on SAR. We ask for comment on whether proof of such measurements and compliance should be submitted as part of the equipment authorization process, and, if so, what form such showings should take.

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[16] In this regard, we are proposing that as a general policy exposure of *non-users* due to hand-held devices and amateur radio facilities will be considered as occurring in uncontrolled environments. Exposure of *users* due to hand-held devices and amateur facilities will also be considered as occurring in uncontrolled environments unless the user is, "aware of the potential for exposure as a concomitant of employment" (e.g., through training or education) or who is otherwise aware of the potential for exposure (as defined by ANSI/IEEE for persons exposed in controlled environments). We ask for comment on whether there are any non-employees who would fall within this latter category, and, if so, who they would be. The term "non-user" refers to other persons in the immediate vicinity of the user who do not fit the criteria specified by ANSI/IEEE for controlled environments.

[17] *See* ANSI/IEEE C95.1-1992 (IEEE C95.1-1991), Section 5 ("Explanation").

[18] These exclusions apply at frequencies between 300 kHz and 100 GHz or between 300 kHz and 1 GHz, respectively. *See* Section 4.2, ANSI C95.1-1982, *supra*. Also, see Appendix A.

[19] *See* Section 4.2, ANSI/IEEE C95.1-1992 (IEEE C95.1-1991). Also, see Appendix A.

[20] As an illustration, at 800 MHz the new ANSI/IEEE guidelines specify that in "uncontrolled environments" (e.g., general public exposure) in order to be excluded a low-power device could not exceed a radiated power level of 1.4 X (450/800) or about 0.79 watts. At 1500 MHz, the exclusion level would be 0.42 watts.

[21] With respect to this issue we note that the Commission has received a Petition for Rule Making, filed February 5, 1993, by Ken Holladay, seeking to prohibit the sale of all hand-held telephones and radios that operate between 400 and 1300 MHz pending evaluation of any health risk. We will treat this petition as a comment in the current proceeding.

[22] *See* footnote 16, *supra*.

18. For purposes of the exclusions that are based on radiated power, we propose to exclude only those low-power devices that meet the uncontrolled guidelines. However, the exclusions based on SAR could apply according to the actual situation or "environment" in which a device is used.

Existing Categorical Exclusions

19. As discussed above, the Commission has exempted a number of transmitting facilities and operations from the NEPA requirement for routine evaluation.[23] These "categorical exclusions" were based on calculations and measurement data indicating that such facilities and transmitters would not cause RF exposures that would violate the 1982 ANSI guidelines under normal and routine conditions of use. Some of the current categorical exclusions may not be consistent with the provisions of the new 1992 ANSI/IEEE guidelines. This may be true with regard to certain currently excluded facilities and operations such as some amateur radio stations and some land-mobile services, both common carrier and private. We, therefore, will review our current categorical exclusions in light of the new guidelines.

20. We request comment, information and analysis relating to the existing categorical exclusions from our RF exposure rules. We intend to address in this proceeding whether it is appropriate to maintain the individual exclusions, particularly those indicated above, and whether we should re-define those exclusions. We request comment and proposals for any changes to our rules that may be necessary to ensure compliance with the RF exposure guidelines, *e.g.*, general power reductions in a service or other restrictive measures. Interested parties are asked to indicate the impact of eliminating an exclusion from the RF exposure rules for specific services, facilities and operations. Such parties are also requested to provide information on how affected facilities and operations could demonstrate compliance with the new guidelines. We also seek proposals and suggestions for alternative plans that would minimize the impact of eliminating exclusions for specific types of transmitting facilities and operations.

21. With respect to occupational exposure, there may be situations where transmitters that have been categorically excluded previously would not cause excessive exposure to members of the *general public*, but might present the possibility of exposure of *workers* to fields in excess of the guidelines. An example might be a relatively high-powered land-mobile or cellular site where workers are in the immediate vicinity (*i.e.*, within a few feet) of a transmitting antenna. How should such situations be dealt with? Should categorical exclusions only be limited to situations where there is no possibility of excessive worker exposure (for example, when work procedures have clearly been established that preclude working near high-powered, transmitting antennas)? Should certification of such procedures be required for previously excluded transmitters before granting a license or other FCC authorization?

Induced and Contact RF Currents

22. The 1992 ANSI/IEEE guidelines also contain new recommendations regarding the maximum permissible exposure from induced and contact RF currents. The former ANSI guidelines did not address these phenomena. The new induced and contact RF current recommendations require exposure evaluation over the frequency range between 3 kHz and 100 MHz. This new requirement has raised some issues as to how these exposure guidelines would be used in evaluating certain broadcast transmitters.[24] For example, because evaluation is limited to frequencies up to 100 MHz, the new requirement raises a question on how to treat FM broadcast stations, especially with regard to multiple stations at a single site.[25] To address this issue, we propose that evaluation for exposure from induced and contact RF currents be carried out by: 1) all FM broadcast stations with carrier frequencies below 100 MHz and 2) all FM broadcast stations regardless of carrier frequency that are located at a single site where one of the stations operates below 100 MHz. We believe that this will ensure that all stations covered by the recommendation are evaluated and that all RF contributions to the exposure at multiple stations sites are considered. We request comment on this approach and on other matters concerning this aspect of the new 1992 ANSI/IEEE guidelines.

Alternative RF Exposure Guidelines

23. The 1992 ANSI/IEEE guidelines are the most recent recommendations on RF exposure from the scientific and technical community. According to the ANSI and the IEEE, the maximum permissible exposure levels recommended in the guidelines are levels "to which a person may be exposed without harmful effect and with an acceptable safety factor."[26] As stated above, we believe that these new standards will provide the Commission with better scientifically-based criteria for use in evaluating human exposure to RF radiation, and ensure that FCC-regulated facilities comply with the latest safety standards for RF exposure.

24. At the same time, we recognize that the 1992 ANSI/IEEE guidelines, while in some ways more restrictive than the 1982 ANSI standards, permit higher exposure levels above 3 GHz than other published exposure recommendations. For example, in "uncontrolled environments," ANSI/IEEE recommends a safe level of 2 milliwatts per square centimeter (mW/cm2) at 3 GHz increasing up to a maximum of 10 mW/cm2 at 15 GHz to 300 GHz. On the other hand, the guidelines issued by the National Council on Radiation Protection and Measure-

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[23] As set forth in Section 1.1306 of the FCC's rules [47 CFR §1.1306(a)], such transmitting facilities and operations are exempted from requirements for "environmental processing" with respect to RF radiation. This means that applicants for such transmitters are not required to perform an environmental evaluation with respect to RF radiation prior to filing an application with the Commission since there is a presumption that these transmitters would normally comply with the limits set forth in the guidelines.

[24] For example, in letters to the IEEE and ANSI, the firm of Hammett and Edison, Inc., has objected to certain features of the ANSI/IEEE guidelines, especially the discontinuity for induced current limits that occurs at 100 MHz in the middle of the FM broadcast band. *See*, letter from Dane E. Ericksen, Hammett and Edison, Inc., to Board of Standards Review, American National Standards Institute, dated February 20, 1992. See paragraph 34, *infra*, for information on reviewing this document at the Commission.

[25] The FM broadcast frequency band is between 88 and 108 MHz.

[26] *See* ANSI/IEEE C95.1-1992 (IEEE C95.1-1991) *supra*, definition of "maximum permissible exposure (MPE)."

ments (NCRP) specify a fixed level of 1 mW/cm2 for exposure of the general public in the frequency range of 1.5 to 300 GHz.[27] In addition, the International Radiation Protection Association's (IRPA) guidelines for public exposure recommend 1 mW/cm2 between 2 GHz and 300 GHz.[28] There are additional differences between the ANSI/IEEE recommendations and these other guidelines. We request comment on whether these differences are significant and whether there is a need to adopt exposure requirements different than those contained in the ANSI/IEEE guidelines.

25. We also note that the NCRP guidelines include a special provision with respect to modulated RF carrier frequencies.[29] The NCRP suggested a need for caution with respect to exposure to electromagnetic fields with carrier frequencies that are modulated at a depth of 50 percent or greater at frequencies between 3 and 100 hertz, and recommended that stricter exposure limits apply for workers exposed to such fields. This recommendation is apparently due to experimental results showing neurophysiological effects of modulated RF fields.[30] We invite comment on the importance of this aspect of the NCRP guidelines for protecting workers from adverse RF exposures. Is this modulation restriction important enough to be considered by the Commission in connection with the ANSI/IEEE guidelines? What would be the practical implications of implementation of this provision if it were adopted by the Commission?

Effective Date and Other Issues

26. We recognize that compliance with the new ANSI/IEEE guidelines could impose new and significant burdens on some licensees and equipment manufacturers. We seek to minimize this impact wherever possible, consistent with the need to implement the important safety protections signified by the RF exposure rules as rapidly as possible. For those facilities and operations that are or will become subject to environmental processing with respect to RF radiation, we propose to continue the requirement that such evaluations be made, and, if necessary, Environmental Assessments filed, at the time of application for a construction permit, license renewal, or other Commission authorization. All such applications submitted after the effective date of the new standard would be evaluated in accordance with the new 1992 ANSI/IEEE guidelines.[31] We request comment on this approach. We also request comment on how best to treat equipment and facilities that are in use but do not comply with the new guidelines. Should we, for example, require re-submission of certain equipment authorization applications?

27. With respect to showing compliance with current RF guidelines, many of the Commission's application forms contain a question on environmental impact. An example of this question is as follows: "Would a Commission grant of this application be an action which may have a significant environmental effect as defined by Section 1.1307 of the Commission's Rules? If 'YES,' submit the statement as required by Sections 1.1308 and 1.1311." On some, but not all, forms, there is an additional statement: "If 'NO,' explain briefly why not." It has been our experience that a simple "NO" answer to this question may not be sufficient for the Commission to adequately judge whether there will be a significant environmental impact, particularly with respect to RF radiation exposure. We request comment on whether the Commission routinely should require more complete documentation or evidence from applicants who claim compliance with environmental RF guidelines. What should this documentation consist of?

Measurement Procedures and Related Issues

28. There are also issues related to the measurement of RF fields and procedures for quantitative determination of exposure. In addition to its revised exposure guidelines, ANSI and IEEE have issued guidelines on measurement procedures for RF electromagnetic fields with respect to hazard assessment.[32] Therefore, we are proposing to specify these measurement guidelines for purposes of showing compliance with ANSI/IEEE C95.1-1992. We request comment on these measurement guidelines and any other measurement procedures that may be relevant.

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[27] "Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86, 1986, National Council on Radiation Protection and Measurements. Copies available from: NCRP Publications, 7910 Woodmont Ave., Suite 800, Bethesda, MD 20814; (301) 657-2652. The NCRP is a non-profit corporation chartered by the United States Congress to, among other things, develop information and recommendations concerning radiation protection. The NCRP is made up of the members and participants who serve on its various scientific committees. Several government agencies and non-government organizations have established relationships with the NCRP either as "Collaborating Organizations" or through a "special liaison" program for governmental organizations. The FCC maintains an association with the NCRP as a Collaborating Organization.

[28] "Guidelines on Limits of Exposure to Radiofrequency Electromagnetic Fields in the Frequency Range from 100 kHz to 300 GHz," International Non-Ionizing Radiation Committee of the International Radiation Protection Association, *Health Physics*, 54(1): 115-123 (1988). The IRPA is a non-governmental, international organization representing most of the national radiation protection societies in the world. These recommendations form part of the WHO Environmental Health Criteria Programme, which is funded by the United Nations Environment Programme (UNEP). Support for IRPA's activities also comes from the International Labour Office and the Commission of the European Communities.

[29] *See* NCRP, *supra*, Section 17.4.7 of NCRP exposure guidelines.

[30] *See* NCRP, *supra*, Section 11.1.2.2 of NCRP exposure guidelines.

[31] It is relevant to note that the next renewal cycle for AM and FM radio broadcast stations begins on October 1, 1995 and ends on August 1, 1998. The next complete renewal cycle for television broadcast stations begins on October 1, 1996 and ends on August 1, 1999. The exact date depends on a given station's geographic location.

[32] "Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields - RF and Microwave," (IEEE C95.3-1991; also designated ANSI/IEEE C95.3-1992 by the American National Standards Institute). Copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc. Copies can be ordered from the IEEE, Attn: Publications Sales, 445 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331, (800) 678-IEEE; or from ANSI, (212) 642-4900. See paragraph 34, *infra*, for information on reviewing this document at the Commission.

29. We are also interesting in obtaining data and information on devices that are commercially available for measuring electric and magnetic fields, induced body currents, and contact currents as defined in the recent ANSI/IEEE guidelines? Are there advantages/disadvantages of certain types of equipment and instrumentation over others? We also request comment on the effectiveness of personal monitors/dosimeters and such things as RF protective clothing in controlling exposure to workers at locations where high RF fields are present.

EX-PARTE PRESENTATIONS

30. This is a non-restricted notice and comment rule-making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally*, 47 CFR Sections 1.1202, 1.1203 and 1.1206(a).

INITIAL REGULATORY FLEXIBILITY ANALYSIS

31. Pursuant to the provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's Initial Regulatory Flexibility Analysis is as follows.

A. Reason for action: Because of the Commission's responsibilities under provisions of the National Environmental Policy Act (NEPA) the Commission must evaluate the significance of its actions on the environment. Since the emission of radiofrequency (RF) radiation from FCC-regulated transmitters is a major environmental effect that must be considered, it is necessary to establish guidelines and thresholds to use in determining whether there is environmental significance. The RF protection guides of the American National Standards Institute (ANSI) that the Commission had adopted in 1985 have now been revised, and it is necessary for us to update our guidelines.

B. Objective: We are proposing to adopt the newly revised guidelines adopted by ANSI and the Institute of Electrical and Electronics Engineers, Inc. (IEEE) that are designated ANSI/IEEE C95.1-1992 (previously published as IEEE C95.1-1991). These guidelines will be used for evaluating the significance to public health of RF radiation emitted into the environment by transmitters regulated by the Commission.

C. Legal basis: This action is a result of the Commission's legal obligations under the NEPA, 42 U.S.C. Section 4321 *et seq.* (1976), to provide the means by which to evaluate Commission actions with respect to environmental significance, and it is in furtherance of Sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j) and 303(r) (1978).

D. Description, potential impact, and number of small entities affected: There may be significant economic impact on small, regulated entities as a result of this action if the new guidelines are officially adopted by the Commission. This is because the new ANSI/IEEE guidelines are more restrictive than previous guidelines and may require additional effort and resources to show compliance or undertake corrective action to bring a transmitter into compliance. This extent of this potential impact will depend on decisions made with respect to categorical exclusion of transmitters from environmental consideration with respect to RF exposure.

E. Recording, recordkeeping, and other compliance requirements: Although no specific compliance requirements are being described at this time, if the Commission adopts the new guidelines applicants may be required to submit additional documentation as part of a showing with respect to environmental compliance.

F. Federal rules which overlap, duplicate, or conflict with these rules: There are none of which we are aware.

G. Any significant alternative minimizing impact on small entities and consistent with the stated objective: We might have considered adopting other exposure criteria that might result in less impact on small entities. However, since we are required to use the best available methodology in evaluating environmental significance, the new ANSI/IEEE guidelines appear to offer the most up-to-date and technically-supportable guidance for evaluating RF exposure.

PROCEDURAL MATTERS

32. Accordingly, there is hereby instituted a Notice of Proposed Rule Making in this proceeding to amend Part 1 of the Commission's Rules and Regulations. Authority for issuance of this Notice of Proposed Rule Making is contained in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended [47 U.S.C. Sections 154(i), 154(j) and 303(r)], and Sections 4321-4335 of the National Environmental Policy Act, 42 USC §§4321-4335. Pursuant to applicable procedures set forth in Sections 1.415, 1.419, and 1.430 of the Commission's Rules, interested parties may file comments on or before **August 13, 1993** and reply comments on or before **September 13, 1993**.

33. All relevant and timely comments will be considered by the Commission. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants would like each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

34. For further information concerning this proceeding contact Dr. Robert F. Cleveland, Office of Engineering and Technology, Spectrum Engineering Division, Mail Stop 1300A2, Federal Communications Commission, Washington, D.C. 20554, (202) 653-8169. Copies of the ANSI/IEEE guidelines and other pertinent documents are available for inspection at the FCC during regular business hours. Please call the above number for scheduling.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

SUMMARY OF MAJOR SECTIONS OF ANSI/IEEE GUIDELINES

I. ANSI C95.1-1982

Principal sections of ANSI C95.1-1982, "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz," are summarized below with permission. The complete text should be consulted for details. This ANSI standard has been copyrighted (1982) by the Institute of Electrical and Electronics Engineers, Inc., (IEEE), New York, N.Y. This standard has now been replaced by ANSI/IEEE C95.1-1992 (see below).

Scope and Purpose:

Recommendations are made to prevent possible harmful effects in human beings exposed to electromagnetic fields in the frequency range from 300 kHz to 100 GHz. These recommendations are intended to apply to non-occupational as well as to occupational exposures. These recommendations are not intended to apply to the purposeful exposure of patients by or under the direction of practitioners of the healing arts.

Definitions:

Radio frequency protection guides (RFPG). The radio frequency field strengths or equivalent plane wave power densities which should not be exceeded without (1) careful consideration of the reasons for doing so, (2) careful estimation of the increased energy deposition in the human body, and (3) careful consideration of the increased risk of unwanted biological effects. Specific absorption rate (SAR). The time rate at which radio-frequency electromagnetic energy is imparted to an element of mass of a biological body.

Recommendations:

Radio Frequency Protection Guides. For human exposure to electromagnetic energy at radio frequencies from 300 kHz to 100 GHz, the protection guides, in terms of the mean squared electric (E^2) and magnetic (H^2) field strengths and in terms of the equivalent plane-wave free-space power density, as a function of frequency, are given in Table 1.

For near field exposures, the only applicable protection guides are the mean squared electric and magnetic field strengths as given in Table 1, columns 2 and 3. For convenience, these guides may be expressed as the equivalent plane wave power density, given in Table 1, column 4.

For both pulsed and non-pulsed fields, the power density, the squares of the field strengths, and the values of specific absorption rates (SARs) or input power, as applicable, are averaged over any 0.1 h period.

Table 1

RADIO FREQUENCY PROTECTION GUIDES

1	2	3	4
Frequency Range (MHz)	Electric Field Strength E^2 (V^2/m^2)	Magnetic Field Strength H^2 (A^2/m^2)	Power Density (mW/cm^2)
0.3-3	400,000	2.5	100
3-30	$4,000(900/f^2)$	$0.025(900/f^2)$	$900/f^2$
30-300	4,000	0.025	1.0
300-1500	4,000(f/300)	0.025(f/300)	f/300
1500-100,000	20,000	0.125	5.0

Note: f = frequency in megahertz (MHz)
E^2 = electric field squared
H^2 = magnetic field squared
V^2/m^2 = volts squared per meter squared
A^2/m^2 = amperes squared per meter squared
mW/cm^2 = milliwatts per centimeter squared

Exclusions:

(1) At frequencies between 300 kHz and 100 GHz, the protection guides may be exceeded if the exposure conditions can be shown by laboratory procedures to produce specific absorption rates (SARs) below 0.4 W/kg as averaged over the whole body, and spatial peak SAR values below 8 W/kg as averaged over any one gram of tissue.

(2) At frequencies between 300 kHz and 1 GHz, the protection guides may be exceeded if the radio frequency input power of the radiating device is seven watts or less.

II. ANSI/IEEE C95.1-1992 (IEEE C95.1-1991)

Some major sections of ANSI/IEEE C95.1-1992 (also issued by IEEE as IEEE C95.1-1991), "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz," are summarized below with permission. This ANSI/IEEE standard has been copyrighted (1992) by the Institute of Electrical and Electronics Engineers, Inc., (IEEE), New York, N.Y. The complete text should be consulted for details. Copies are available from ANSI [telephone: (212) 642-4900] or the IEEE [telephone: (800) 678-IEEE (4333)].

Maximum Permissible Exposure (MPE) for Controlled Environments

Electromagnetic Fields (controlled environments)

Frequency Range (MHz)	Electric Field Strength E (V/m)	Magnetic Field Strength H (A/m)	Power Density (S) E-field; H-field (mW/cm^2)
0.003-0.1	614	163	(100;1,000,000)*
0.1-3.0	614	16.3/f	(100; 10,000/f^2)*
3.0-30	1842/f	16.3/f	(900/f^2; 10,000/f^2)*
30-100	61.4	16.3/f	(1.0; 10,000/f^2)*
100-300	61.4	0.163	1.0
300-3000	--	--	f/300
3000-15,000	--	--	10
15,000-300,000	--	--	10

Notes: f = frequency in megahertz (MHz)
E = electric field
H = magnetic field
V/m = volts per meter
A/m = amperes per meter
mW/cm^2 = milliwatts per centimeter squared

* These plane-wave equivalent power density values, although not appropriate for near-field conditions, are commonly used as a convenient comparison with MPEs at higher frequency and are displayed on some instruments in use.

Averaging Times for Maximum Permissible Exposure (controlled environments)

Frequency Range (MHz)	Averaging Time (minutes) $\|E\|^2$; S; or $\|H\|^2$
0.003-0.1	6
0.1-3.0	6
3.0-30	6
30-100	6
100-300	6
300-3000	6
3000-15,000	6
15,000-300,000	$616,000/f^{1.2}$

f = frequency in MHz

Induced and Contact Radiofrequency Currents (controlled environments).
(may not adequately protect against startle reactions caused by transient discharges when contacting an energized object; see complete text for details)

Frequency Range (MHz)	Maximum Current (milliamps) Through both feet	Through each Foot	Contact Current
0.003-0.1	2000f	1000f	1000f
0.1-100	200	100	100

f = frequency in MHz

Maximum Permissible Exposure (MPE) for Uncontrolled Environments

Electromagnetic Fields (uncontrolled environments)

Frequency Range (MHz)	Electric Field Strength E (V/m)	Magnetic Field Strength H (A/m)	Power Density (S) E-field; H-field (mW/cm^2)
0.003-0.1	614	163	(100;1,000,000)*
0.1-1.34	614	16.3/f	(100; $10,000/f^2$)*
1.34-3.0	823.8/f	16.3/f	($180/f^2$; $10,000/f^2$)*
3.0-30	823.8/f	16.3/f	($180/f^2$; $10,000/f^2$)*
30-100	27.5	$158.3/f^{1.668}$	(0.2; $940,000/f^{3.336}$)*
100-300	27.5	0.0729	0.2
300-3000	--	--	f/1500
3000-15,000	--	--	f/1500
15,000-300,000	--	--	10

Notes: f = frequency in megahertz (MHz)
E = electric field
H = magnetic field
V/m = volts per meter
A/m = amperes per meter
mW/cm^2 = milliwatts per centimeter squared

* These plane-wave equivalent power density values, although not appropriate for near-field conditions, are commonly used as a convenient comparison with MPEs at higher frequency and are displayed on some instruments in use.

Averaging Times for Maximum Permissible Exposure (uncontrolled environments)

Frequency Range (MHz)	Averaging Time (minutes) $\|E\|^2$; S	$\|H\|^2$
0.003-0.1	6	6
0.1-1.34	6	6
1.34-3.0	$f^2/0.3$	6
3.0-30	30	6
30-100	30	$0.0636f^{1.337}$
100-300	30	30
300-3000	30	--
3000-15,000	90,000/f	--
15,000-300,000	$616,000/f^2$	--

f = frequency in MHz

Induced and Contact Radiofrequency Currents (uncontrolled environments).
(may not adequately protect against startle reactions caused by transient discharges when contacting an energized object; see complete text for details)

Frequency Range (MHz)	Maximum Current (milliamps) Through both feet	Through each Foot	Contact Current
0.003-0.1	900f	450f	450f
0.1-100	90	45	45

f = frequency in MHz

Exclusions

Controlled Environments. At frequencies between 100 kHz and 6 GHz, the MPE in controlled environments for electromagnetic field strengths may be exceeded if:

(a) the exposure conditions can be shown by appropriate techniques to produce SARs below 0.4 W/kg as averaged over the whole-body and spatial peak SAR, not exceeding 8 W/kg as averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube), except for the hands, wrists, feet and ankles where the spatial peak SAR shall not exceed 20 W/kg, as averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube), and
(b) the induced currents in the body conform with the MPE [for controlled environments].

The SARs are averaged over any 6-minute interval. Above 6 GHz, the relaxation of the MPE under partial body exposure conditions is permitted [see Section 4.4 of IEEE C95.1-1991 or ANSI/IEEE C95.1-1992].

At frequencies between 0.003 and 0.1 MHz the SAR exclusion rule, stated above, does not apply. However, the MPE in controlled environments can still be exceeded if it can be shown that the peak rms current density, as averaged over any 1 cm^2 area of tissue and 1 second does not exceed 35f mA/cm^2 where f is the frequency in MHz.

Low-Power Devices: Controlled Environment. This exclusion, consistent with [the provisions given above], pertains to devices that emit RF energy under the control of an aware user. This exclusion addresses exposure of the user. For such devices, the exposure of other persons in the immediate vicinity of the user

will meet the exclusion criterion for the uncontrolled environment. [See below]

At frequencies between 100 kHz and 450 MHz, the MPE may be exceeded if the radiated power is 7 watts or less.

At frequencies between 450 and 1500 MHz, the MPE may be exceeded if the radiated power is 7(450/f) watts or less where f is frequency in MHz.

This exclusion does not apply to devices with the radiating structure maintained within 2.5 cm of the body.

Uncontrolled Environments. At frequencies between 100 kHz and 6 GHz, the MPE in uncontrolled environments for electromagnetic field strengths may be exceeded if:

(a) the exposure conditions can be shown by appropriate techniques to produce SARs below 0.08 W/kg as averaged over the whole-body and spatial peak SAR, not exceeding 1.6 W/kg as averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube), except for the hands, wrists, feet and ankles where the spatial peak SAR shall not exceed 4 W/kg, as averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube), and

(b) the induced currents in the body conform with the MPE [for uncontrolled environments].

The averaging time for SARs is as indicated in [the table for uncontrolled environments]. Above 6 GHz, the relaxation of the MPE under partial body exposure conditions is permitted [see Section 4.4 of IEEE C95.1-1991 or ANSI/IEEE C95.1-1992].

At frequencies between 0.003 and 0.1 MHz the SAR exclusion rule does not apply. However, the MPE in uncontrolled environments can still be exceeded if it can be shown that the peak rms current density, as averaged over any 1 cm^2 area of tissue and 1 second does not exceed 15.7f mA/cm^2 where f is the frequency in MHz.

Low-Power Devices: Uncontrolled Environment. This exclusion, consistent with [the provisions given above], pertains to devices that emit RF energy without control or knowledge of the user. At frequencies between 100 kHz and 450 MHz, the MPE may be exceeded if the radiated power is 1.4 watts or less. At frequencies between 450 and 1500 MHz, the MPE may be exceeded if the radiated power is 1.4(450/f) watts or less where f is frequency in MHz. This exclusion does not apply to devices with the radiating structure maintained within 2.5 cm of the body.

APPENDIX B

PRELIMINARY ANALYSIS OF IMPACT OF NEW ANSI/IEEE GUIDELINES

Broadcast

It is difficult to measure the exact impact on the broadcast community due to the complexity of the new standard and the relative lack of information on how certain aspects of the new guidelines can be implemented with respect to broadcast stations. One source that may be helpful is a 1985 report commissioned by the Environmental Protection Agency (EPA) to help determine costs incurred in implementing various radiofrequency "guidance" levels for exposure of the general public in the broadcast community.[33] This report included information on broadcaster compliance with field intensity levels comparable to those recommended by the ANSI/IEEE guidelines. However, the EPA report did not consider the impact of the induced current limitations contained in the new guidelines. Furthermore, the report is based on information gathered several years ago, and its database included only approximately 9000 radio stations and 1000 television stations. The report also only addresses single-facility installations and does not consider the cumulative levels of RF energy that may be present at multiple-user sites.

(1) AM Radio

The EPA report estimated that of approximately 4600 AM stations analyzed, only about 100-500 (about 2-11%) would require corrective action to comply with field intensity levels roughly comparable to the ANSI/IEEE guidelines. However, this is probably an underestimate since compliance with induced current limits for the public and for workers was not considered. Since compliance with induced current limitations would probably affect AM stations the most of all broadcasters, the actual percentage impacted could be significantly higher than the EPA figure.

(2) FM Radio

Of 4400 FM radio stations the EPA report estimated that about 750 stations (approximately 17%) would require corrective action to comply with public exposure limits essentially the same as those contained in the ANSI/IEEE 1992 guidelines. However, once again, induced current limitations were not considered, and the actual impact could be greater.

(3) Television

Only 40 (about 4%) television stations of approximately 1100 analyzed were judged to require corrective measures to comply with levels similar to the ANSI/IEEE thresholds. Since most television stations operate at frequencies for which there are no induced current limitations, this estimate may be more accurate than those for radio stations. However, induced current limitations would apply for channels 2-6, and there could be additional impact for stations operating at these frequencies.

Other Services

It appears that the greatest impact of the new guidelines will fall within the broadcast services. For non-broadcast services there is also likely to be some impact, but the extent of that impact will depend largely on which transmitters or services are categorically excluded from environmental processing. Until we have more extensive

[33] U.S. Environmental Protection Agency, Office of Radiation Programs, Washington, D.C. 20460, "An Estimate of the Potential Costs of Guidelines Limiting Public Exposure to Radiofrequency Radiation from Broadcast Sources, Vol.1: Report," EPA 520/1-85-025, July 1985.

information on the variables that determine compliance with the guidelines, it is not possible to arrive at exact figures on impact.

Due to the more restrictive field intensity levels in "uncontrolled" environments there may be transmitters, now categorically excluded, that could not be justifiably excluded in all cases with respect to the new guidelines. For example, the following table gives "worst-case" estimates of the minimum height above ground for a simple dipole antenna at various power levels that might be required to meet the "uncontrolled" field intensity limits between 100 and 300 MHz. If there are situations where these minimum height requirements are not met, or if there are multiple transmitters at an accessible site with relatively high cumulative power, the limits might be exceeded, and environmental analysis would be required.

Estimated Minimum Height to Meet ANSI/IEEE Limits for Field Intensity (100-300 MHz, "uncontrolled") at ground level

Est. Min. Height Above Ground (meters)	Operating Power (ERP) in watts
6	100
8	200
11	500
15	1000
20	2000

Similar tables can be constructed for "controlled environments," for other frequencies, and for other antenna types. However, each situation will be different, and the likelihood of exposures that exceed the guidelines will depend on many factors including accessibility and intermittency of operation, as well as frequency and power. In addition, the new restrictions on induced and contact currents may impact facilities that operate below 100 MHz and may make evaluation of some previously excluded transmitters necessary.

The majority of land-mobile transmitters will very likely comply with the ANSI/IEEE guidelines in most environments. However, there may be some situations, e.g., paging or multiple-transmitter sites, where higher powered transmitters may require evaluation. In addition, there may be questions related to compliance with the induced current limitations at HF frequencies, and compliance with respect to hand-held devices.

With respect to satellite communications, there could be compliance problems with respect to transportable earth stations where appropriate restrictions have not been placed on accessibility. However, such situations may be relatively uncommon. Since main-beam access is usually necessary for excessive exposure from satellite-dish antennas, and since this does not normally occur, the majority of these transmitters should not cause an exposure problem.

Separate Statement
of
Commissioner Ervin S. Duggan

In Re: Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation

I support today's action to update the Commission's processing standards under the National Environmental Policy Act of 1969. I hope that the parties will provide us useful information both on the revised 1992 American National Standards Institute (ANSI) standard for radiofrequency (RF) exposure that we propose to adopt and on the procedures we should use in putting that standard into effect.

The safety of the services and facilities that we license, and the equipment we approve, are a vital concern. The National Environmental Policy Act requires us to ensure that our licensing and other regulatory actions do not create adverse health or environmental effects. While we do not have the primary government responsibility in this area (that task belongs to other agencies such as the Food and Drug Administration and the Environmental Protection Agency), the FCC undoubtedly has an obligation to work closely with the frontline health and safety agencies to ensure the safety of equipment that emits RF radiation.

It is worth emphasizing here that the FCC has a continuing responsibility to track and take account of any changes in widely-accepted standards regarding RF exposure, such as the revised ANSI/IEEE standard we propose to adopt today. In this connection, the press and public should be aware that the FCC began work on this notice of proposed rulemaking last fall, as soon as the revised ANSI standard was adopted. Our proceeding was launched in the normal course of business--- not as a response to any recent publicity about the safety of FCC-approved equipment.

This is as it should be: press scares and media hype are poor substitutes for the careful processes of science and government. The FCC and other government agencies, as well as the cellular industry, will work energetically to resolve questions about the safety of all RF devices. Meanwhile, it is important to keep such safety questions in perspective: *Any* new technology presents risks and uncertainties, which must be weighed intelligently against the obvious benefits that new technology brings. Modern life challenges us to balance those risks with courage and calm analysis, and to avoid hysteria.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning
Operator Service Access and
Pay Telephone Compensation

ORDER ON FURTHER RECONSIDERATION AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 11, 1993; Released: April 9, 1993

Comment Date: May 10, 1993
Reply Comment Date: June 9, 1993

By the Commission: Commissioner Duggan issuing a statement.

I. INTRODUCTION

1. We have before us petitions for reconsideration or clarification of policies and rules the Commission recently adopted in its *Order on Reconsideration* in the above-captioned docket[1] concerning blocking and screening services which local exchange carriers (LECs) must offer to operator service providers (OSPs). For the reasons set forth below, we reaffirm and clarify the requirements in the *Reconsideration Order* that LECs must provide a discrete federally tariffed service which blocks all direct-dialed international calls and that they must provide originating line screening (OLS) and billed number screening (BNS) as tariffed services. We clarify that we will not further delay the unblocking of 10XXX access. We also propose general principles that must be adhered to by LECs providing required OLS and BNS services. We request comment on those principles and on the question of whether LECs should be required to make their international blocking services available to all customers, not just aggregators. Finally, we request comment on whether we should require that BNS and OLS services be tariffed at the federal level.

II. BACKGROUND

2. Previous legislative and administrative actions relating to the practices of OSPs have included a general Commission rulemaking proceeding, CC Docket No. 90-313,[2] federal legislation,[3] and the current proceeding, CC Docket No. 91-35. In the first phase of CC Docket No. 91-35, we ordered all call aggregators to unblock 10XXX access but refrained from requiring LECs to offer blocking and screening services which would help call aggregators protect themselves from losses due to fraud.[4] In our *Reconsideration Order*, however, we ordered LECs to federally tariff services which would block international direct-dialed sequences (011+ and 10XXX-011+). We also required the LECs to offer two tariffed screening services, OLS and BNS, which indicate to operator service providers any billing restrictions on lines to which a caller may seek to bill a call. [5] The *Reconsideration Order* required the LECs to comply with these requirements by January 10, 1993.

3. Seven LECs filed petitions for reconsideration of the blocking and screening requirements in the *Reconsideration Order*.[6] Five oppositions and seven replies were also filed in this proceeding.[7]

III. DISCUSSION

A. Jurisdictional Issues

1. Commission Jurisdiction Over International Blocking

4. *Petitions and Comments.* Pacific argues that the Commission lacks authority under Sections 201-205 of the Communications Act, 47 U.S.C. §§ 201-205, to order Pacific to provide a new interstate service, especially one which, Pacific alleges, is completely unrelated to any existing interstate service.[8] Pacific further says that the *Reconsideration Order* needlessly, arbitrarily and unlawfully displaces state regulation of blocking services for international calls. None of the petitions directly addressed whether the Commission has the jurisdiction to require the LECs to federally tariff the screening services mandated by the *Reconsideration Order*.

5. *Discussion.* The *Reconsideration Order* limits the blocking requirement to international direct dialed calls and expressly declines to require the LECs to offer domestic

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[1] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Report and Order and Further Notice of Proposed Rule Making, 6 FCC Rcd 4736 (1991); Second Report and Order, 7 FCC Rcd 3251 (1992); and Order on Reconsideration, 7 FCC Rcd 4355 (Reconsideration Order) (1992).

[2] Policies and Rules Concerning Operator Services Providers, CC Docket No. 90-313, Report and Order, 6 FCC Rcd 2744 (1991); Order on Reconsideration, 7 FCC Rcd 3882 (1992).

[3] The Telephone Operator Consumer Services Improvement Act of 1990, which added Section 226 to the Communications Act of 1934, Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

[4] Report and Order, 6 FCC Rcd at 4741.

[5] Reconsideration Order, 7 FCC Rcd at 4361.

[6] The petitioning LECs are Bell Atlantic, CBT, GTE, NYNEX, Pacific, SNET and SWBT. Those petitions were all filed on September 3, 1992. SNET filed a corrected copy of its petition on September 9, 1992.

[7] By October 20, 1992, the following parties had filed oppositions to the petitions for reconsideration: APCC, AT&T, MCI and Sprint. USTA filed a pleading on this date captioned "Comments." APCC, Ameritech, Bell Atlantic, CBT, MCI, NYNEX and Pacific all filed replies by November 4, 1992.

[8] Pacific Petition at 2-4 Pacific cites several cases, including Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) (*Louisiana*), and California v. FCC, 905 F.2d 1217 (9th Cir. 1990) (*California*), to support its contention that we lack the jurisdiction to order federal tariffing of this service. Pacific also claims that there is no evidence that international blocking services are interstate services and argues that federal tariffing has no rational basis and does not further a valid purpose.

call blocking service.[9] Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), gives the Commission jurisdiction over "all interstate and foreign communication...." while Section 2(b), 47 U.S.C. § 152(b), denies the Commission jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier...." Pacific's argument is that the blocking function, because it takes place in the local switch and because all other end user blocking services are tariffed at the state level, is necessarily an intrastate function over which the Commission lacks jurisdiction.

6. Pacific's argument, however, ignores the fact that we are dealing with international communications, over which the Communications Act gives the Commission exclusive jurisdiction. The fact that the blocking function takes place in the local switch or is an option currently offered as a supplement to a local service does not determine jurisdiction for a function that is related solely to international communications.[10] Therefore, Pacific's reliance on *Louisiana* and *California* is misplaced; those cases dealt with the federal preemption of intrastate regulation of jurisdictionally mixed services. In the present case, the service in question is purely international and therefore within the Commission's exclusive jurisdiction.

7. In any event, Section 226(g) of the Communications Act[11] also grants us authority to impose this blocking requirement. That section directs the Commission to require such actions as are necessary to ensure that aggregators are not exposed to undue risk of fraud. In the present case, all aggregators are required to unblock 10XXX and may thereby be exposed to some risk of toll fraud if they are not able to take adequate measures to protect themselves. Petitioners would have us leave the fraud protection to state tariffs. However, the record shows that some of the currently available state services may fall short of what we have determined, as a matter of federal policy, is necessary to prevent toll fraud. Many state tariffs either do not provide international blocking services or do not make the service available to all aggregators. Moreover, some of these tariffs combine international call blocking with other services so that the aggregators lose desired revenue if they subscribe to the international blocking services.

8. In any event, if we decide to require federal tariffing of the OLS and BNS services used with interstate communications services as we later propose in this order, we do not intend to preempt states from regulating the manner in which these screening services are provided in connection with intrastate communications services. Therefore, the proposed requirement would be in compliance with Section 152 of the Communications Act because it would preserve state jurisdiction over the provision of such services for intrastate calls.

2. Carrier Initiated Tariffs

9. *Petitions and Comments.* Pacific alleges that the Communications Act does not grant the Commission the authority to require the filing of tariffs for what it claims are local services not currently provided under interstate tariffs. It specifically cites Sections 201-205 of the Communications Act as creating a system of carrier-initiated tariffs and interprets that as denying the Commission the power to order services which it claims are local to be federally tariffed.[12] Further, Pacific argues that the Commission cannot take this action under ancillary jurisdiction because that would conflict with and destroy the balance that, Pacific argues, is created by Sections 201-205 of the Communications Act.[13]

10. *Discussion.* As noted above, contrary to the premise of Pacific's argument, international call blocking is an international, not a local, service. Accordingly, the Commission has the authority to order the LECs to tariff this international service.[14] Moreover, the Commission has been charged by Congress with the responsibility for regulating the operator services industry and the reduction of toll fraud was an express part of that mandate.[15] To the extent that Pacific is also arguing that the Commission cannot require it to offer the service and tariff it, even assuming it is an international service, the Commission's authority to order LECs to file interstate tariffs has long been recognized if that action furthers statutory objectives and otherwise complies with statutory limitations.[16] Therefore, we reject Pacific's contention that the Commission can only act in response to carrier initiated tariffs.

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[9] Reconsideration Order, 7 FCC Rcd at 4361.

[10] *See e.g.*, State Corporation Commission of Kansas v. FCC, 787 F.2d 1421, 1427 (10th Cir. 1986); National Association of Regulatory Utility Commissioners v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (NARUC - WATS); New York Tel. Co. v. FCC, 631 F.2d 1059, 1065-66 (2d Cir. 1980); Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 699-700 (1st Cir. 1977); North Carolina Utilities Commission v. FCC, 537 F.2d 787, 793 (4th Cir. 1976). *Cf.* United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968). Writing in 1984, Judge Bork observed: "Every court that has considered the matter has emphasized that the nature of the communications is determinative [of FCC jurisdiction] rather than the physical location of the facilities used." *NARUC-WATS*, 746 F.2d at 1498. The Supreme Court's decision in *Louisiana* did not alter this well-established principle. *See* Public Utility Commission of Texas v. FCC, 886 F.2d 1325, 1327-35 (D.C. Cir. 1989).

[11] 47 U.S.C. § 226(g). Section 226 is the Telephone Operator Consumer Services Improvement Act of 1990. *See* n.3, *supra*. Section 226 establishes a general regulatory framework for operator services, including the filing of informational tariffs for OSP services and the unblocking of access to non-presubscribed carriers.

[12] Pacific Petition at 9.

[13] *Id.* at 10 and n.13.

[14] *See* 47 U.S.C. §§ 152(a), 203.

[15] *See* n.3, *supra*.

[16] *See* Lincoln Tel. and Tel. Co. v. FCC, 659 F. 2d 1092, 1108-09 (1981) The court upheld the Commission's authority to require Lincoln to file an interstate tariff detailing the charges and regulations covering interconnection. The court stated that Commission's authority to require such filings can be based on Sections 154(i) and 203(a), 47 U.S.C. §§ 154(i) and 203(a), *see also* 47 U.S.C. §§ 201-205; Access Charges Proceeding: MTS and WATS Market Structure, Docket No. 78-72, Third Report and Order, 93 FCC 2d 241, 327 (1983), *aff'd* and *remanded in part*, National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert den.* 105 S. Ct. 1224, 1225 (1985).

B. LEC Blocking Services

11. *Petitions and Comments.* Petitioners and USTA generally oppose federal tariffing of international call blocking as duplicative, unwise and difficult to implement.[17] Also, Petitioners argue that we should change our decision in the *Reconsideration Order* so that we would allow the LECs' state tariffed services to fulfill our international blocking requirement.[18] GTE states that it cannot mix its billing systems, one for end user services and one for access services, and that it would be difficult to administer billing if international call blocking was federally tariffed.[19]

12. Finally, APCC and AT&T support federal tariffing. AT&T states that it is necessary because the international blocking offerings of many LECs are not available to all aggregators but are restricted to Customer Owned Coin Operated Telephones (COCOTs).[20] APCC argues that New York Telephone Company's international call blocking service is inadequate because it combines international direct-dialed blocking services with domestic direct-dial interLATA (1+) blocking, which requires aggregators to forego revenues from desirable interLATA traffic in order to block unwanted international traffic. APPC also states that, when that service was first introduced, it failed to transmit system intercept tones and suppressed the transmission of ANI codes on operator-assisted calls, thereby subjecting some subscribing aggregators to increased fraud. APCC also states that aggregators continue to experience problems with the consistency and reliability of that service.[21]

13. *Discussion.* We affirm the *Reconsideration Order* requirement that the LECs provide a discrete federally tariffed service which blocks all direct-dialed international calls (011+ and 10XXX-011+). The petitioning LECs do not dispute that such blocking is an effective means of reducing fraud; they primarily object to blocking services being tariffed at the federal level and point out jurisdictional and implementation problems which they believe such tariffing will create. While we recognize that there may be some initial difficulties in implementing this requirement, we believe that they are clearly outweighed by the public interest in providing a uniform nationwide blocking service which does not exclude any class of aggregators, which effectively deters toll fraud, and which satisfies the requirements of Section 226(g) of the Act.

14. Because of the apparent interest of some parties, we also solicit additional comment on whether we should require that LECs make their international call blocking services available to all customers, rather than just aggregators.[22] Specifically, we request comment on whether a discrete federally tariffed international call blocking service is useful in helping non-aggregator business customers prevent toll fraud and whether it should also be available to residential customers. We recognize that imposing such requirements on carriers might prove burdensome. Accordingly, we seek comment on the nature and extent of such burdens or administrative problems as well as on the benefits to consumers in terms of providing protection against toll fraud.

C. LEC Screening Services

1. State or Federal Tariffing

15. *Petitions and Comments.* Petitioners ask us to clarify whether their state tariffed OLS services satisfy the *Reconsideration Order*.[23] SNET states that it is uncertain whether the order requires that the mandated screening services be filed in its interstate access tariffs and asks that the Commission clarify this issue by allowing it to meet any interstate tariffing requirement by certifying to the Commission that OLS and BNS services are available under its intrastate tariffs.[24] Bell Atlantic asks the Commission to confirm that the OLS service it offers to carriers through its "Line Number Toll Screening database" satisfies the Commission's requirements.[25]

16. *Discussion.* In order to assure that the screening services for interstate communications, which are required in the *Reconsideration Order*, adequately ensure that aggregators are not exposed to an undue risk of fraud, we tentatively conclude that they should be tariffed at the federal level. We further tentatively find that, for interstate traffic, OLS and BNS services must: (1) be generally available and not restricted to any class of customers, (2) be provided as a discrete unbundled service and (3) be provided at a reasonable rate. Furthermore, with regard to OLS services, all LECs must assign the screening codes in a nationally uniform manner.

17. The LECs could apparently add OLS and BNS services to their interstate access tariffs, in much the same way that they added blocking of direct-dialed international calls. If this were done, the Commission could review those tariffs and ensure that they comply with our proposed minimum requirements. As a practical matter it might be difficult for the Commission to review the content of those services or require revisions if the services are tariffed only

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[17] SWBT also states that blocking is not possible for switched access traffic for some types of trunk side connections, specifically Circuit Switched Trunk Side Alternative B Basic Service Arrangement (BSA-B) and Circuit Switched Trunk Side Alternative D Basic Serving Arrangement (BSA-D). SWBT Petition at 2. However, SWBT's argument incorrectly assumes that the *Reconsideration Order* requires the LECs to provide the capability of blocking international calls on every access service in their interstate tariff.

[18] GTE Petition at 2 (stating that blocking services for end users are traditionally contained in local exchange tariffs); SNET Petition at 2-3 (arguing that blocking is more appropriately offered in state exchange tariff); CBT Petition at 2; SWBT Petition at 4. However, none of the LECs proposing to rely on blocking services tariffed at the state level have provided any detailed information about those services.

[19] GTE Petition at 3; SNET Petition at 4 (arguing that federal tariffing would require SNET to issue a separate bill to each customer each month).

[20] AT&T Opposition at 5 (stating that Ameritech, Bell Atlantic, BellSouth, Southwestern Bell, GTE and Centel "often" have this restriction).

[21] APCC Opposition at 11 n.9.

[22] In pleadings filed in response to LEC international call blocking tariffs required in Docket 91-35, this issue was presented to the Commission. *See, e.g.*, Comments of APCC on Southwestern Bell Telephone Transmittal No. 2242, at 8 (filed December 10, 1992), and APCC Comments on GTOC Transmittal No. 752, at 4 (filed November 25, 1992).

[23] Pacific Petition at 2 n.2; NYNEX Petition at 3; SNET Petition at 5.

[24] SNET Petition at 5.

[25] Bell Atlantic Petition at 2-3.

at the state level. The Commission might have to initially review the content of those state tariffs, and also conduct another review each time the LECs amended their state tariffs. Commission acceptance of state tariffed OLS and BNS services could require the Commission either to be intrusively involved in the state tariffing process or to regulate less effectively the content of the screening services.

18. Finally, we recognize that some LECs may have planned to rely on their state tariffed services to meet the screening service requirement. As indicated below, we have to develop a further record before finally deciding whether to require these screening services to be federally tariffed. In the meantime, however, we do not find that relying on state tariffed services will create a risk of toll fraud sufficient to require the deferral of 10XXX unblocking. Therefore, we will allow LECs to use state tariffed screening services, pending the outcome of this proceeding.

2. Screening of Originating Lines

19. *Petitions and Comments.* Several Petitioners comment that they currently offer OLS service. This service is typically delivered through the transmission of a two digit class of service code on each call originating from a line taking OLS service.[26] The LECs generally use the information indicators, generally referred to as "II" digits, which are sent with the Automatic Number Identification ("ANI"), in a combination known as "ANI II."[27] Additionally, several of the LECs have supplemental databases containing more detailed information about the nature of the billing restrictions which apply to a particular line. Pacific, Bell Atlantic and SNET each state that they offer some form of OLS but do not specifically describe their services.[28] NYNEX asks that it not be required to tariff its database which provides more detailed information about the specific billing restriction on the line.[29]

20. In their oppositions, other parties argue that the OLS services currently offered in the LECs' state tariffs are not adequate to protect aggregators against toll fraud.[30] APCC argues that the LECs' OLS services should provide more information about the exact nature of the billing restrictions than they currently provide, either through the provision of codes unique to aggregators or through databases which give more detailed information.[31] AT&T states that LEC screening services should be made available to all aggregators, not just COCOTs, and that the LECs should be required to offer them on an unbundled basis.[32] MCI states that the OSP needs to receive uniform signals from all LECs in order to properly identify restrictions on the line and prevent fraud.[33] MCI also states that some LECs provide basic business service to payphone providers so that the information indicators accompanying the ANI from such a phone identify the line as a regular business line and, therefore, fail to indicate that any billing restrictions exist on the line.[34]

21. In its reply, Pacific states that its duty should be to deliver the two digit ANI II code and that it should be the IXC's responsibility to develop a more detailed database from the information the IXC receives when the line is presubscribed.[35] It also states that several MCI and AT&T requests exceed the *Reconsideration Order's* requirements with regard to screening services and that these parties should have filed their own motions for reconsideration if they wanted to amend the Commission's decision.[36] MCI's reply raises the issue of whether our *Reconsideration Order* required LECs to provide screening services to aggregators or OSPs.[37] CBT argues that requiring implementation of a new ANI II code would be expensive and the demand for it is doubtful.[38]

22. *Discussion.* The *Reconsideration Order* found that OLS "may provide a useful fraud control mechanism" and directed local exchange carriers to offer, in locations where technically feasible, tariffed OLS services which indicate to OSPs any billing restrictions on lines to which a caller may seek to bill a call.[39] The *Reconsideration Order* also noted that screening services were already widely offered by the LECs.[40] There was a divergence of opinion among the parties about whether the LECs' state tariffed OLS services would meet the requirements of the order.[41] For example, several parties have raised the issue of whether various

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[26] NYNEX Petition at 3; CBT Petition at 2-3.

[27] This two digit numerical code can be sent with ANI. For example, the code "07" has been assigned the designation "Inmate/Hospitals/Coinless Public Telephones" and several LECs indicate that this is the code that is generally used to designate aggregator lines. APCC Opposition at 20; Pacific Reply at 5; NYNEX Reply at 1 n.1; Ameritech Reply at 1. For ANI II, adding new two digit codes is administratively difficult. A more advanced version of this service is being deployed as Flex ANI, in which new codes are more easily added. *See e.g.* SWBT Tariff F.C.C. No. 73, Sections 6.5.2 (B)(2) and 6.5.2 (B)(31).

[28] Pacific Petition at 2 n.2; Bell Atlantic Petition at 2 (has provided carriers with originating line screening since 1989 through license of a Line Number Toll Screening database); SNET Petition at Exhibit I.

[29] NYNEX Petition at 3.

[30] *See e.g.*, MCI Opposition at 3 (stating that the Commission also should require the provision of the two digit ("II") information code in the LEC's interstate switched access tariffs to ensure that all OSPs purchasing switched access service receive the information digits).

[31] APCC Opposition at 21; *but see* MCI Reply at 2 (supports need for specific, identifiable code for aggregators but opposes requiring LECs to provide databases); *see also*, NYNEX Reply at 2 (NYNEX has recently filed a tariff to introduce a flexible ANI service that will provide three additional Bellcore-assigned ANI codes to operator services providers).

[32] AT&T Opposition at 7 (AT&T alleges that OLS is often bundled with blocking of 1+ service, thereby requiring aggregators to forego revenue from the resale of domestic traffic in order to obtain OLS service).

[33] MCI Opposition at 3.

[34] *Id.*

[35] Pacific Reply at 6. However, Pacific's Reply fails to recognize that OLS screening services will be used by OSPs when processing calls dialed with a 10XXX dialing sequence and that those OSPs would be unable to obtain information about billing restrictions on lines not presubscribed to them.

[36] *Id.* at 4.

[37] MCI Reply at 2; *See also* Ameritech Reply at 1 (interprets order as requiring that screening services be provided to OSPs).

[38] CBT Reply at 2.

[39] Reconsideration Order, 7 FCC Rcd at 4361.

[40] *Id.*

[41] *See e.g.* SNET Petition at 2 (not clear what specific services or tariff offerings the Commission contemplates or whether SNET's present state tariffed service offerings meet the Commission's intent); APCC Opposition at 21-22 (impliedly required federal tariffing by setting same six month deadline for screening and blocking services; there is no language in the

aspects of the state tariffed services, such as bundling or inconsistent code assignment policies, will hinder or unduly penalize the aggregators' ability to prevent toll fraud.

23. The widespread existence of state OLS services persuades us that through those services aggregators will receive reasonable protection against toll fraud, at least on an interim basis, while we consider whether federal tariffs are required for these services. Therefore, we find that state tariffed services that provide OLS will satisfy the requirements of our order on an interim basis, pending further proceedings in this docket. However, on a longer term basis, we tentatively conclude that, in order to fulfill our Congressional mandate, the LEC OLS services must be federally tariffed and meet the minimum standards set forth in paragraph 16, *supra*. Finally, we decline to require any tariffing of supplemental databases which provide more detailed information about the nature of billing restrictions on a line because the record shows that doing so could impose an undue burden on some LECs without providing significantly better protection against fraud.

24. We solicit additional comment on whether state or federal tariffing of LEC OLS services would better serve the public interest and prevent toll fraud. We specifically request comment on whether the LECs' existing federally tariffed ANI II or Flex ANI services would meet the requirements of the *Reconsideration Order*.[42] We also request comment on what additional codes have been, or could be, assigned by Bellcore to provide more detail about different classes of aggregator service and whether we should require that those codes be implemented by the LECs as Flex ANI is deployed. We also solicit comments on our proposed requirements for OLS. Finally, we request comments on how, if state tariffing of OLS is allowed, the Commission could ensure that state tariffed services would meet those minimum standards.

3. Screening of Billed Numbers

25. *Petitions and Comments.* Bell Atlantic claims that BNS service is already available through its Line Information Database (LIDB) billing validation service, a federally tariffed offering.[43]

26. *Discussion.* Proper prevention of toll fraud requires that the LECs provide a discrete unbundled BNS service. We tentatively find that Bell Atlantic's federally tariffed LIDB service does deliver the information required; the question is whether the service is provided in a way that is useful to customers, including aggregators and, therefore, we tentatively conclude that LEC BNS services must meet the requirements set forth in paragraph 16, *supra*. We also tentatively conclude that we would be better able to fulfill our congressional mandate to protect aggregators from being exposed to an unreasonable risk of toll fraud if the service was tariffed at the federal level. Because LECs have already filed LIDB tariffs which may meet this requirement, we tentatively conclude that federal tariffing of BNS should be required and would not impose unreasonable disruption or hardship on LECs.[44] However, we also find that state tariffed BNS services will satisfy the requirements of our order on an interim basis, pending further proceedings in this docket.

27. Therefore, we solicit comments on whether federal tariffing of BNS is technically and otherwise feasible. We also solicit comments on whether and if so, how, this service could be offered to aggregators rather than OSPs and how this requirement would affect BNS services tariffed at the state level. We also seek comment on whether the LECs' federal LIDB tariffs need to be amended to provide a BNS service that is available to aggregators and others.

4. Waivers and Extensions of Time

28. *Petitions and Comments.* SWBT requested that we grant SWBT a waiver of Section 61.74 of the Commission's Rules, 47 C.F.R. § 61.74, to allow it to cross-reference the blocking services for international calls in its state tariffs.[45] Several Petitioners also request that we allow more time for blocking services to be put in place if we allow state tariffing of these services or allow federal tariffs that incorporate state tariffs by reference. They argue that they cannot control how long state commissions will take to approve tariffs containing such blocking services and that, therefore, they cannot ensure compliance until after the states have acted.[46]

29. Additionally, Pacific argues that, if its customer-owned pay telephone (COPT) and Toll Access Trunk services are federally tariffed, the Commission will need to create an additional service category and an additional basket or to exclude these services from price cap regulation. APCC counters that federal tariffing of those services is unnecessary because LEC blocking services are no more dependent on local services than are numerous other interstate services, such as long distance service.[47]

30. *Discussion.* We decline to grant a waiver to allow either SWBT or Pacific to file a federal tariff that cross-references international blocking services contained in state tariffs. The Commission has found that it is in the public

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order to indicate that the Commission intended to allow its requirements to be satisfied by filing state tariffs); Pacific Reply at 2-4 (Commission implicitly found that such *state* tariffing would ensure that OLS is available to aggregators); NYNEX Petition at 3 (wants clarification that LECs are only required to offer OLS under their state tariffs); Bell Atlantic Reply at 2 (the order does not purport to regulate, or to require the interstate tariffing of toll or other billing restrictions that an aggregator may want to place on a telephone line).

[42] The Reconsideration Order temporarily exempted aggregators in non-equal access areas from the requirement to unblock 10XXX. *See* Reconsideration Order, 7 FCC Rcd at 4364. If LECs experience technical problems in delivering OLS services from these areas, we will entertain requests for waivers from the LECs.

[43] Bell Atlantic Petition at 2.

[44] Some independent LECs do not plan to offer BNS through LIDB service directly but rather to transfer data to a third party that will operate the database for several independent LECs. We find that the bulk transfer of data by an independent LEC would satisfy its obligation, provided that the third party offers an effective BNS service on its behalf.

[45] SWBT Petition at 4; Pacific Petition at 12 n.14 (Pacific's waiver request references Sections 61.38, 61.47 and 61.49(g) and (h), as well as 61.74, 47 C.F.R. §§ 61.38, 61.47, 61.49(g) and (h), and 61.74).

[46] SWBT Petition at 4; NYNEX Petition at 2 (should require international blocking to become effective 30 days after state tariffs become effective); GTE Petition at 3.

[47] APCC Opposition at 8 n.7.

interest to unblock 10XXX access from aggregator telephones. We found that LEC blocking and screening services are essential to prevent toll fraud and that aggregators are not required to unblock 10XXX until they are in place. We have delayed requiring such unblocking for approximately ten months pending the outcome of this proceeding and the subsequent introduction of LEC blocking and screening services. We decline to allow any more time for LECs to comply with our requirement that they put international blocking services and screening services in place. With regard to the question of the proper price cap treatment, these will be new services and, therefore, will not immediately need to be classified by basket or service category.

IV. CONCLUSION

31. In this Order, we have declined either to reconsider our decision to require LECs to provide federally tariffed blocking of international direct-dialed calls or to extend the deadline for 10XXX unblocking. We have also sought comment on the steps the LECs must take to meet our requirement that they provide OLS and BNS services and on whether LECs should be required to offer international call blocking services to a wider class of customers.

V. EX PARTE PRESENTATIONS

32. This is a nonrestricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

33. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b) does not apply to this rule making proceeding because if promulgated, it would not have a significant economic impact on a substantial number of small entities. The definition of a "small entity" in Section 3 of the Small Business Act excludes any business that is dominant in its field of operation. Although some of the local exchange carriers that will be affected are very small, local exchange companies do not qualify as small entities because they have a nationwide monopoly on ubiquitous access to the subscribers in their service area. The Commission has found all exchange carriers to be dominant in the *Competitive Carrier* proceeding, 85 FCC 2d 1, 23-24 (1980). To the extent that small telephone companies will be affected by these rules, we hereby certify that these rules will not have a significant economic effect on a substantial number of "small entities." Although we do not find that the Regulatory Flexibility Act is applicable to this proceeding, this Commission has an ongoing concern with the effect of its rules and regulation on small business and the customers of the regulated carriers. The Secretary shall send a copy of the Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.*

VII. ORDERING CLAUSES

34. Accordingly, IT IS ORDERED that, pursuant to authority contained in Sections 1, 4, 201-205, 218, 220 and 226 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 220, and 226, that the policies and requirements set forth herein ARE ADOPTED.

35. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Bell Atlantic, Cincinnati Bell Telephone, GTE Service Corporation, New York Telephone Company and New England Telephone and Telegraph Company, Pacific Telesis, Southern New England Telephone Company and Southwestern Bell Telephone Company, ARE DENIED.

36. IT IS FURTHER ORDERED that Southwestern Bell Telephone's Request for Waiver of Section 61.74 of the Rules, 47 C.F.R. § 61.74, and Pacific Bell's Request for Waiver of Sections 61.38, 61.47, 61.49(g) and (h) and 61.74(a) of the Rules, 47 C.F.R. §§ 61.38, 61.47, 61.49(g) and (h) and 61.74(a), ARE DENIED.

37. IT IS FURTHER ORDERED that this Order on Further Reconsideration will be effective thirty (30) days after publication of a summary thereof in the Federal Register.

38. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4, 201-205, 226 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154, 201-205, 226 and 303(r), that a FURTHER NOTICE OF PROPOSED RULEMAKING IS ISSUED.

39. IT IS FURTHER ORDERED, pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, that all interested parties may file comments on the issues in paragraphs 14, 24 and 27 on which comment is specifically sought by **May 10, 1993** and reply comments by **June 9, 1993**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M. Street, N.W., Washington, D.C. 20554.

40. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau is delegated authority to require the submission of additional information, make further inquiries, and modify the dates and procedures if necessary to provide for a fuller record and a more efficient proceeding.

41. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this FURTHER NOTICE OF PROPOSED RULEMAKING, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

List of Parties Filing Petitions, Oppositions or Replies:

American Public Communications Council	(APCC)
American Telephone & Telegraph Company	(AT&T)
Ameritech Operating Companies	(Ameritech)
Bell Atlantic Telephone Companies	(Bell Atlantic)
Cincinnati Bell Telephone	(CBT)
GTE Service Corporation	(GTE)
MCI Corporation	(MCI)
New York Telephone Company and New England Telephone and Telegraph Company	(NYNEX)
Pacific Bell	(Pacific)
Southern New England Telephone Company	(SNET)
Southwestern Bell Telephone Company	(SWBT)
Sprint Corporation	(Sprint)
United States Telephone Association	(USTA)

Separate Statement of Commissioner Ervin S. Duggan

In re: Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Order on Further Reconsideration and Further Notice of Proposed Rulemaking, CC Docket No. 91-35

I warmly support the proposals that we put forth in this item. If shown to be feasible, they should do much to help operator services providers, pay telephone owners, and end users protect themselves against toll fraud. I am assured that the Commission will conduct an expedited review of the record filed in response to these proposals.

The problem of telephone toll fraud continues despite recent laudable industry efforts to address it. The FCC, along with all other participants--- carriers, equipment manufacturers, local telephone companies, and end users---has a role to play in combatting toll fraud.

The steps we propose today should make additional tools available to customers to help protect themselves:

* First, we propose to require local telephone companies to make available to all customers the international call blocking services that they already provide, under federal tariff, to call aggregators. These blocking services could help end users protect themselves against toll fraud by making it impossible to make illegal international calls---the biggest source of toll fraud.

* Second, we propose to require federal tariffing of the local telephone company screening services that call aggregators need to protect themselves from other forms of fraud.

The Commission, in my judgment, must continue to put high priority on stemming toll fraud.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff Transmittal
Contract Tariff F.C.C. No. 104	Nos. 191 and 210

ORDER

Adopted: April 16, 1993; Released: April 16, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On March 30, 1993, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing provides Software Defined Network Service, 800 services, and Private Line services. Customers receive value offers of a variety of services or products in association with the customer's minimum annual commitment level for the term of the contract. The transmittal is scheduled to become effective on April 17, 1993.[2]

2. On April 6, 1993, MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 191. AT&T replied on April 12, 1993.

3. The Common Carrier Bureau has reviewed the transmittals and all associated pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 104, Contract Tariff Transmittal No. 191, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

[2] The Bureau deferred the effective date of Contract Tariff Transmittal 191 to April 17, 1993. AT&T subsequently filed revisions to the tariff which indicate the dollar value in U.S. Currency of the services and products provided to customers as value offers. AT&T Communications Contract Tariff F.C.C. No. 104, Contract Transmittal No. 210 (filed Apr. 16, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMSC Subsidiary Corp. Transmittal No. 1
Tariff F.C.C. No. 3

ORDER

Adopted: April 19, 1993; Released: April 19, 1993

By the Chief, Tariff Division, Common Carrier Bureau:

1. On April 6, 1993, AMSC Subsidiary Corporation (AMSC), filed the above-captioned tariff establishing the rates, terms and conditions for the provision of AMSC's Mobile Telephone Service. The transmittal is scheduled to become effective April 20, 1993.

2. On April 13, 1993, General Communications, Inc. (GCI) filed a petition to reject, or in the alternative, suspend and investigate the tariff transmittal.

3. The Common Carrier Bureau has reviewed AMSC's Transmittal No. 1 and the pleadings filed with respect to this transmittal. We conclude that the proposed tariff is not patently unlawful so as to warrant rejection and presents no question that warrants suspension or investigation at this time.

4. Accordingly, IT IS ORDERED that the petition to reject, or in the alternative, suspend and investigate filed by General Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FOX TELEVISION
STATIONS, INC.

Licensee of Station
WNYW(TV), New York, New York

Request for waiver of the
Newspaper Cross-Ownership
Rule Relating to WNYW(TV) and
the *New York Post*

ORDER

Adopted: April 16, 1993; **Released: April 16, 1993**

Comment Date: May 10, 1993
Reply Date: May 17, 1993

By the Chief, Mass Media Bureau:

1. On April 12, 1993, the Commission issued a *Public Notice* establishing the procedure for parties interested in submitting comments relating to the request by Fox Television Stations, Inc. (Fox) for permanent waiver of the newspaper-broadcast cross-ownership rule, Section 73.3555(c)(3). Fox filed the request in order that it may continue to hold the license for station WNYW(TV), Channel 5, New York, New York, following the acquisition of the *New York Post* by NYP Acquisition Corp. (NYP). Both Fox and NYP are controlled by K. Rupert Murdoch. Comments were set to be filed on or before April 26, 1993, and reply comments on or before May 3, 1993.

2. Although the Commission has reached no decision on the merits of Fox's waiver request, it has determined, upon initial review, that further information is needed before it may fully consider the request. Accordingly, Fox is directed to submit, on or before April 20, 1993, information to the following inquiries, supported by affidavits of persons having personal knowledge of the facts stated:

(1) a full description of the effort made to sell the *New York Post* by current owner Peter S. Kalikow prior to the time the newspaper was placed in bankruptcy and subsequent efforts by the bankruptcy court to dispose of the newspaper;

(2) the price at which the *Post* was listed in connection with the efforts to sell; and

(3) the certification of a newspaper broker that in his or her view the listing price of the *Post* was consistent with its fair market value.

3. In addition, on April 14, 1993, the New York Chapter of the National Hispanic Media Coalition and other national and New York City organizations allied with that organization (Caucus), requested a two-week extension of the initial comment period, until May 10, 1993, for the filing of comments. Caucus maintains that the original comment schedule affords it an inadequate period of time for its preparation of a joint pleading on behalf of more than a dozen national and New York City organizations, several elected New York City, New York State and Congressional representatives, and at least one prominent media organization. On April 16, 1993, Fox responded to Caucus' request, alleging that the financial condition of the *Post* warrants consideration of its waiver request as soon as possible.

4. In view of our request to Fox for further information, we believe that it would be more conducive to the orderly and expeditious dispatch of the Commission's consideration of the Fox waiver request to extend the period of time in which to comment so that commenters may simultaneously address the initial request and the supplemental information requested herein. However, all parties are hereby advised that further extensions of the comment period are not contemplated.

5. Accordingly, IT IS ORDERED, That for good cause shown, the deadline for filing comments is extended to **May 10, 1993,** and to **May 17, 1993** for reply comments.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ELGAR PARTNERSHIP

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton, NY, State College, PA and Lake Placid, FL service areas and on the F-Group channels to serve the Augusta, ME, Newport, OR and Fairbanks, AK service areas

In re Applications of

WHF, INC.

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton, NY, State College, PA and Lake Placid, FL service areas and on the F-Group channels to serve the Augusta, ME, Newport, OR and Fairbanks, AK service areas

In re Applications of

JDG, INC.

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton, NY, State College, PA and Lake Placid, FL service areas and on the F-Group channels to serve the Augusta, ME, Newport, OR and Fairbanks, AK service areas

In re Applications of

LDG, INC.

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton, NY, State College, PA and Lake Placid, FL service areas and on the F-Group channels to serve the Augusta, ME, Newport, OR and Fairbanks, AK service areas

In re Applications of

SOL SCHILDHAUSE

to construct and operate new Multichannel Multipoint Distribution Service Stations on the E-Group channels to serve the Binghamton, NY, State College, PA service areas and on the F-Group channels to serve the Augusta, ME service area

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1993; Released: April 26, 1993

By the Commission:

1. The Commission has under consideration an Application for Review jointly filed on behalf of Elgar Partnership; WHF, Inc.; JDG, Inc.; LDG, Inc. and Sol Schildhause (Applicants). Applicants seek review of the Managing Director's decision that denied reconsideration of the Commission's action returning their applications for various MMDS facilities.[1]

2. The applications in question were dismissed for failure to submit a separate FCC Form 155 and check with each individual MMDS application. Instead, each Applicant submitted a single Form 155 and a single fee payment to cover all of its applications for proposed MMDS facilities in as many as six separate markets. Because this filing method violated the Commission's procedures implemented to ensure the efficient processing of fees, the Managing Director denied Applicants' request for reinstatement of their applications.

3. On review, Applicants claim that confusion surrounded the implementation of the fee program, and therefore the Managing Director should have reinstated their applications. They claim that the rules were unclear, particularly the provisions relating to the consolidation of fees on a single Form 155 ("fee multiples"), and that a liberal application of the fee rules in this instance was warranted. Applicants also claim that the Managing Director should have considered their misplaced reliance on erroneous information that they contend was received from the Commission's "Fees Hotline." Finally, Applicants contend that dismissal of their applications was unduly harsh and that reinstatement will serve the public interest.

4. Upon consideration of Applicants' arguments, we conclude that their Application for Review should be denied. Contrary to Applicants' claim that the applicable rules were confusing, at the time Applications filed their applications,[2] the fee rules regarding the FCC Form 155 requirement stated clearly that "[e]ach application or other filing...must be accompanied by a remittance in the full amount of the fee due and FCC Form 155." 47 C.F.R. § 1.1107(a); *Memorandum Opinion and Order in Establish-*

[1] Applicants also seek reinstatement *nunc pro tunc* of their applications.

[2] Applicants were required to file their applications before the filing window closed on May 29, 1990. *Public Notice*, Report No. D-553, released March 28, 1990.

ment of a Fee Collection Program, 5 FCC Rcd 3558, 3569 ¶24 (1990)(*Fee Order*) ("A separate Fee Form will be required for each distinct application"). Finally, the rules made clear that the penalty for noncompliance was dismissal: "[a]pplications or requests subject to fees that are submitted without the FCC Form 155 will be dismissed." 47 C.F.R. § 1.1107(a)(2).

5. Moreover, the Commission also had explicitly set forth the circumstances in which a single Form 155 covering multiple fees could be used. 5 FCC Rcd at 3569 ¶24. In this regard, the *Fee Order* stated:

> A separate Fee Form will be required for each distinct application, but, where a single application can be used to request multiple licenses, stations, or frequencies, a single Fee Form, accompanied by a single payment, will suffice.

Id. Those circumstances clearly did not apply to the applications in question.

6. In addition, prior to the effective date of the rules, the Commission had conducted an informational campaign to instruct the public about the revised fees and filing procedures. This consisted of a series of public notices and a public workshop that was held on April 24, 1990, one month before the Applicants filed their applications. Review of the videotape of this workshop reveals that use of the new Form 155 and the circumstances in which "fee multiples" could be used were discussed in detail. Nevertheless, as evidence of the purported confusion, Applicants emphasize that additional instructional measures were taken after the fee program was fully operational and after the subject applications were filed. However, merely because the Commission subsequently issued public notices and held public meetings concerning fee multiples does not in any way establish that the filing requirements were unclear at the date these Applicants filed their applications.[3]

7. Applicants further contend that the Managing Director failed to address their reliance upon erroneous advice that counsel for Applicants received from the Commission's "Fees Hotline." However, after reviewing the matter carefully with the staff, we are satisfied that Applicants were not in fact given erroneous information by the staff and that any miscommunication that may have occurred was not the fault of the Commission or its personnel.[4]

8. Finally, we do not agree that it would serve the public interest to ignore the Form 155 rule in this interest and reinstate the subject applications. The Commission expressly stated in implementing the use of FCC Form 155, that "[b]ecause the Fee Form is essential to the efficient processing of fees, the failure to submit the form will result in the dismissal of the underlying application." *Fee Order*, 5 FCC Rcd at 3569 ¶25. With the expected three-fold increase in feeable applications occasioned by the new Schedule of Charges set forth in the *Fee Order*, the Commission sought to utilize the "most cost-efficient method of cash management in collecting fees" and "to ensure the rapid deposit of funds." *Id.* at 3561 ¶ 6. The Form 155 requirement was a critical and necessary part of achieving these objectives, as it would make it possible for the lockbox bank to make the initial determination of whether the correct fee had been paid without reading the underlying materials and would permit the creation of a data base containing a complete record of payments. *Id.* at 3569 ¶22. The Commission's interest in maintaining the integrity and efficiency of its fee collection program through strict enforcement of this requirement is thus not outweighed by Applicants' claim that the consequences are unduly harsh, particularly since the rules are clear both as to the general "one fee and Form 155 per application" requirement and the consequences for failure to comply.

9. For the foregoing reasons, we affirm the Managing Director's action dismissing Applicants' MMDS applications for failure to submit FCC Form 155. Accordingly, IT IS ORDERED, that the Application for Review of the Managing Director's February 27, 1991 decision filed by Elgar Partnership; WHF, Inc.; JDG, Inc.; LDG, Inc. and Sol Schildhause is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[3] Applicants cite the Commission's *Public Notice*, Mimeo No. 4092, released July 20, 1990 as an indication that confusion existed concerning fee multiples. This document included a "detailed listing of fee type codes that will accept the use of multiples." *Id.* We note that on July 6, 1990 the Commission also issued a Public Notice in which the rules expressly were "*modified* to permit the filing of a single FCC Form 155 and single check along with a series of applications that form a 'system.'" *Public Notice*, "Part 21, Point-to-Point Microwave Fee Filing Procedures Modified," July 6, 1990 (emphasis added). These changes, which occurred well after the subject applications were filed, "modified," rather than "clarified" the rules, and, in any event, had no effect on the procedures that apply to the subject applications.

[4] In their petition for reconsideration, Applicants submit an affidavit stating that a legal assistant associated with counsel for Applicants was informed by a Fees Hotline representative that the use of fee multiples for MMDS applications for different markets was permitted. Applicants explain that following return of their applications, the legal assistant met with a Hotline supervisor and was told that MMDS applications do not qualify for the fee multiple rule and that each different application must be accompanied by a separate Form 155 and separate check. The affidavit goes on to imply that the Hotline supervisor suggested a reason why misinformation had been provided: "[i]t was determined that the Fee Hotline representative had misunderstood that [Applicants] intended to file for six *different* markets and had, therefore, given . . . incorrect instructions." Petition Appendix 2 at para. 7 (emphasis in original). In fact, the Hotline supervisor who discussed the particular incident did not in any way agree that an error had been made by FCC hotline staff or that any alleged erroneous advice was the result of a misunderstanding. The supervisor, who subsequently questioned the staff involved concerning the incident, was informed by the staff that the legal assistant, who was well known to the FCC staff, had been in a hurry when he asked the question. The legal assistant was told that fee multiples probably could not be used but the staff would check with a supervisor. When the staff person returned to the line after checking, the legal assistant was gone. Hence, there was no misunderstanding on the part of the Hotline representative as to the nature of the legal assistant's question, nor did the representative provide erroneous information.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-277

In the Matter of

Amendment of Section 73.202(b), RM-8112
Table of Allotments,
FM Broadcast Stations.
(Broken Bow, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 7, 1993; Released: April 28, 1993

By the Chief, Allocations Branch:

1. At the request of CarePhil Communications ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7835 (1992), requesting the substitution of Channel 291C2 for Channel 291C3 at Broken Bow, Oklahoma, and the modification of Station KKBI-FM's license accordingly. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 291C2 for Channel 291C3 at Broken Bow since it could enable Station KKBI-FM to expand its coverage area. Channel 291C2 can be allotted to the community with a site restriction of 24.8 kilometers (15.4 miles) north to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify Station KKBI-FM's license to specify operation on the higher class channel.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Broken Bow, Oklahoma	291C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of CarePhil Communications for Station KKBI-FM, Broken Bow, Oklahoma, IS MODIFIED to specify operation on Channel 291C2, in lieu of Channel 291C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, CarePhil Communications, licensee of Station KKBI-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 291C2 at Broken Bow are North Latitude 34-14-45 and West Longitude 94-46-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-304

In the Matter of

Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations. (Albion, Lincoln, and Columbus, Nebraska) — RM-7787

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 7, 1993; Released: April 28, 1993

By the Chief, Allocations Branch:

1. At the request of Citadel Communications Company, Ltd. ("Citadel"), licensee of Station KCAN (ABC), Channel 8, Albion, Nebraska, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 6038 (1991) ("*Notice*"), proposing the substitution of UHF TV Channel 18 for VHF Channel 8 at Albion, Nebraska, the allotment of Channel 8 to Lincoln, Nebraska, as the community's second local commercial television transmission service and the modification of Station KCAN's license to specify Lincoln as its community of license.[1] Citadel filed comments in support. Chronicle Publishing Company ("Chronicle"), licensee of Station WOWT(TV), Omaha, Nebraska, Pulitzer Broadcasting Company, licensee of Station KETV(TV), Channel 7, Omaha, Nebraska, Pappas Telecasting of the Midlands, licensee of Station KPTM(TV), Channel 42, Omaha, Nebraska, Busse Broadcasting Corporation, licensee of Station KOLN-TV, Lincoln, Nebraska, Nebraska Television Corporation, licensee of Station KHAS-TV, Hastings, Nebraska, and Joseph Girard,[2] filed comments in opposition. Citadel and Chronicle filed reply comments.

2. *Background.* In the *Notice*, we stated that Citadel proposes to reallot Channel 8 from Albion, a community of approximately 1,900 persons, to Lincoln, a community of 195,600 persons.[3] Lincoln, the capitol of Nebraska, is served by one commercial VHF television station and one noncommercial educational television station. Two vacant but unapplied for UHF channels are allotted to Lincoln. We sought comment on whether the public interest would be better served by reallotting Channel 8 to Lincoln or by retaining the channel at Albion. To ensure that Albion would not be deprived of its sole local transmission service, Citadel proposed, and the *Notice* sought comment on, the allotment of Channel 18 to Albion as a replacement for Channel 8. We noted Citadel's pledge that it would seek authorization to operate Channel 18, and that if there are competing applications for the channel, it would request authorization as an interim licensee pending selection of a permittee. Citadel also stated that it would begin operation of Channel 18 at Albion simultaneously with the relocation of Channel 8 at Lincoln.

3. In its comments, Citadel contends that Lincoln is "uniquely underserved" in relation to its size and importance in both Nebraska and the United States. Citadel argues that because Lincoln has only one commercial television station and receives no Grade A signals from any of Omaha, Nebraska's network affiliated stations, it has less television service than any other city of comparable size. In contrast, Albion is one of the smallest communities in the U.S. with a commercial VHF station. Citadel argues that adoption of its proposal to reallot Channel 8 to Lincoln will result in a preferential arrangement of allotments because the much larger community of Lincoln will receive its first competitive commercial television transmission service, and Albion will retain its first local commercial television transmission service by the allotment and activation of Channel 18. Additionally, Citadel maintains that from its proposed transmitter site, Channel 8 at Lincoln will provide Grade B service to an additional 146,210 persons, and Channel 18 at Albion will provide Grade B service to 98,471 persons within a 21,642 square kilometer (8,360 square mile) area including a first television reception service to 886 persons within a 223 square kilometer area and a second television reception service to 9,036 persons within a 3,717 square kilometer area.

4. The opposing commenters offer several arguments in opposition to the proposed reallotment. First, they argue that the proposed change of community should be denied pursuant to Section 73.3555 of the Commission's Rules not only because the Grade B contour of Channel 18 at Albion will overlap the Grade B contours of both Channel 8 at Lincoln and Citadel's Station KCAU (ABC) Channel 9, Sioux City, Iowa,[4] but also because the proposal will result in Grade B overlap between Channel 8 at Lincoln and Station KCAU at Sioux City. Chronicle maintains that although Citadel proposes to operate Channel 18 at Albion as a satellite of Station KCAU at Sioux City, there would also be overlap between Channel 18 at Albion and Chan-

[1] Alternatively, Citadel proposed to reallot Channel 8 to Columbus, Nebraska, as that community's first local television transmission service. Columbus (population 19,480, according to the 1990 U.S. Census) is approximately 120 kilometers (75 miles) from Lincoln. Citadel states, however, that it would prefer to move to Lincoln. Parties did not specifically address the public interest benefits of reallotting Channel 8 to Columbus instead of Lincoln. Our resolution of this case does not require consideration of the public interest benefits of the Columbus proposal.

[2] Girard is the court-appointed successor-receiver for stations in the "NTV Network." The network includes Stations KHGI-TV, Channel 13, Kearney, Nebraska, and its satellites KWNB-TV, Channel 6, Hayes Center, Nebraska, KSNB-TV, Channel 4, Superior, Nebraska, and four translators.

[3] Population estimates in the pleadings are based on both 1980 and 1990 U.S. Census data, as some of the pleadings were filed prior to the availability of 1990 U.S. Census data. We are examining populations in this case based on 1990 U.S. Census data, unless otherwise indicated.

[4] Station KCAN, Channel 8 at Albion, is presently operated as a satellite of commonly owned ABC affiliate Station KCAU, Sioux City.

nel 8 at Lincoln. Since Channel 18 could not simultaneously be a satellite of both the Lincoln and Sioux City stations, Chronicle maintains, Citadel would have to divest itself of either Station KCAU or Station KCAN in order to operate Channel 18. A number of opposing commenters claim that it is unlikely that anyone else will apply for Channel 18, given Citadel's description of Channel 8's current financial situation.[5] Second, opposing commenters maintain that the proposal would cause a severe interruption in service to existing viewers of Albion Channel 8. They claim that up to 419,000 people who currently view Channel 8 would be deprived of the service, and that new white and gray areas would be created. The opposing commenters do not believe that replacement of Channel 8 with Channel 18 is sufficient, as the Commission should not allow a rural underserved area to be deprived of a valuable VHF service and replaced with an "inferior" UHF service. They claim that Citadel's offer to continue to serve Albion on Channel 18 is an "empty gesture" because the Commission cannot enforce such a promise.

5. Furthermore, they argue that, contrary to Citadel's representations, Lincoln is not unique in terms of television allotments with respect to size or importance and does not need another allotment. They point out that there are two vacant allotments in Lincoln which are available for application if Citadel wishes to serve the community.[6] They also claim that Lincoln is well served by Omaha stations, and therefore an additional station is not necessary.[7]

6. In reply, Citadel argues that its proposal would not violate the Commission's multiple ownership rules. It notes that the current Commission authorized area of Grade B contour overlap between Station KCAU at Sioux City and Channel 8 (Station KCAN) at Albion encompasses 87,085 persons. It claims that adoption of its proposal would result in an area of overlap between Station KCAU at Sioux City and Channel 8 at Lincoln encompassing less than 7,000 persons. Citadel characterizes the population within this latter overlap area as "negligible and clearly within the range repeatedly approved by the Commission." Citadel also argues that the overlap area receives an abundance of other signals and that Sioux City and Lincoln stations are in distinct markets. Citadel additionally argues that any overlap between Station KCAU at Sioux City and Channel 18 at Albion will not prohibit its operation of the station, as it will apply to operate the Albion station as a satellite of Station KCAU. It notes that, even assuming that it becomes the permittee of Channel 18, the degree of Grade B contour overlap between Channel 18 at Albion and Station KCAU at Sioux City will decrease, and the population within the area of overlap will decrease to 29,339 persons.

7. Citadel also maintains that there would be no cognizable service disruption or loss area resulting from the change in community. It states that there would be a loss area of less than 50,000 people who currently receive Channel 8 at Albion but who would not receive replacement service from either the newly allotted Channel 18 at Albion or Channel 8 at Lincoln. Citadel argues that approximately 35,000 of these people reside in the current area of overlap between Channel 8 at Albion and Station KCAU at Sioux City and will continue to receive a Grade B signal from ABC affiliate Station KCAU. It also states that the remaining persons who would not receive a Grade B signal from either Station KCAU at Sioux City or Channel 18 at Albion will receive a Grade B signal from ABC affiliate Station KHGI-TV, Channel 13, Kearney, Nebraska. Moreover, it maintains that some 670,000 persons will receive additional service from the proposal, and that this gain area far outweighs any losses.[8]

8. *Discussion.* We have carefully considered the comments filed in response to the *Notice* and we believe grant of this proposal would serve the public interest. As an initial matter, we note that opposing commenters have raised concerns over the possibility that this proposal could violate the contour overlap prohibitions of our multiple ownership rules. *See* Section 73.3555(a)(3) of the Commission's Rules. However, the predicted Grade B contour overlap between Citadel's Station KCAU-TV, Sioux City, its proposed Station KCAN at Lincoln, and proposed Channel 18 at Albion does not bar consideration of this proposal. Citadel will be expected to file applications for the Lincoln and Albion channels in compliance with the multiple ownership rules, including an appropriate divestiture commitment, waiver request, or other action. While we recognize opponents' concerns, we believe that, consistent with past

[5] Citadel alleged in its petition for rule making that Albion is incapable of supporting its own full time station, that Channel 8 has been operated as a satellite station for 23 of 26 years of operation, and that it loses money yearly.

[6] We do not believe that the presence of vacant channels in the community is a relevant factor in this proceeding. Section 1.420(i) of our Rules was adopted in order to provide a procedure by which licensees and permittees could seek a change in community of license without facing competing expressions of interest, as would happen if the permittee or licensee were required to file an application for a vacant channel. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989). To require a licensee to apply for an available vacant channel in a preferred community of license, rather than permitting that licensee to seek a change of community, could discourage the filing of proposals that otherwise would be in the public interest.

[7] In addition, Girard opposes the proposal because of the potential economic impact on its stations. However, we will not consider allegations of potential economic harm in resolving allotment proceedings. *See, e.g., Dunn, Fuquay-Varina, Hope Mills, Topsail Beach and Williamston, North Carolina*, 4 FCC Rcd 2301 (1989).

[8] Citadel challenges the Commission's decision in the *Notice* to specify an alternate transmitter site for Channel 8 at Lincoln to avoid the Kansas City "freeze zone." We proposed a different site than that requested in Citadel's petition for rule making pursuant to the freeze on amendments to the Television Table of Allotments and applications for television construction permits in certain markets, including Kansas City. *See In the Matter of Advanced Television Systems and Their Impact on the Existing Television Broadcast Service ("Freeze Order")* 52 Fed. Reg. 28346 (July 29, 1987). Citadel argues that Station KCAN at Lincoln could only interfere with Kansas City Channel 8, which is already precluded by existing stations that are closer to Kansas City. It also argues that its proposed site would be within the freeze zone by only 12.5 kilometers (7.8 miles), and should therefore merit a waiver of the *Freeze Order*. We note that the specification of alternate reference coordinates for the Channel 8 allotment was consistent with our treatment of petitions proposing amendments within freeze zones. Thus, we will adopt the reference coordinates which were specified in the *Notice*. This action does not preclude Citadel from seeking a waiver, in connection with its application for the channel, in order to use its preferred site.

practice, any waiver request or other matters regarding the multiple ownership rules are more properly addressed during the application process. *See, e.g., Morristown, New York*, 5 FCC Rcd 6976 (1990).[9]

9. We have performed an engineering analysis to determine the reception gain and loss areas that would result from adoption of this proposal, based on the alternate transmitter site specified for Channel 8 at Lincoln in the *Notice*.[10] Our analysis indicates that Station KCAN at Albion currently serves approximately 585,000 people. The operation of Channel 8 at Lincoln, in conjunction with the operation of Channel 18 at Albion, would result in a gain in reception service area of 25,345 square kilometers and approximately 668,778 people. Our analysis also indicates that the operation of Channel 8 at Lincoln and Channel 18 at Albion would provide a first television reception service to 1,742 square kilometers and 12,433 people, and a second television reception service to 4,059 square kilometers and 14,641 people.[11] The removal of Channel 8 from Albion and replacement with Channel 18, however, will create a reception loss area of 8,729 square kilometers and 51,441 people who currently receive Channel 8's signal but would not receive the signal of Channel 18. In addition, the removal of the channel would create a gray area of 42 square kilometers and 105 persons. While we carefully consider any proposal that would result in a loss of existing reception service, we believe the public interest is well served by the reallotment of a channel that would provide a first and second television reception service to approximately 27,000 persons. Furthermore, the effects of the removal of Channel 8 from Albion are mitigated by the fact that almost 48,000 of the approximately 51,000 people in the Channel 8 loss area will continue to receive at least four television reception services. Moreover, all but 713 of the persons who would lose ABC service from Channel 8 will continue to receive ABC service from either Channel 18 at Albion, Station KCAU, Sioux City, or Station KHGI-TV, Kearney.

10. Grant of this petition for rule making is premised on Citadel's pledge that it will file an application to operate Channel 18 at Albion as a satellite of its ABC affiliate Station KCAU, Sioux City, Iowa. Were it not for this pledge, we would not consider granting this proposal.[12] Therefore, we will condition the grant of an authorization to operate Station KCAN on Channel 8 at Lincoln upon the selection of a permittee and the activation of equivalent replacement ABC network service on Channel 18 (or an equivalent channel) at Albion. This will ensure that virtually all of the current viewers of Albion Channel 8 will experience no significant loss of network television service.[13]

11. Channel 8 can be allotted to Lincoln with a site restriction of 42.8 kilometers (26.6 miles) northwest to avoid a short-spacing to Station KCCI, Channel 8, Des Moines, Iowa, and to avoid the Kansas City freeze area. Channel 18 can be allotted to Albion with a site restriction of 36.2 kilometers (22.5 miles) northwest to avoid short-spacings to Station KXNE, Channel 19, Norfolk, Nebraska, and to unused and unapplied for Channel *21 at Albion.[14] In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license for Station KCAN to specify Lincoln, Nebraska, as its community of license on Channel 8, in lieu of Albion, Nebraska.

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[9] We note, however, that the Albion station is already authorized as a satellite station with respect to Station KCAU at Sioux City, and that the Commission has in the past approved the acquisition of an additional station which overlaps a pre-existing parent/satellite combination. *See Living Faith Ministries, Inc.*, 7 FCC Rcd 4245 (1992); *Sidney Warner*, 64 RR 2d 1774 (1988); *Central Minnesota Television, Inc.*, 2 FCC Rcd 6730 (1987). Furthermore, based on the site restriction we impose on Channel 8 at Lincoln in this proceeding, the degree of Grade B contour overlap between Channel 8 at Lincoln and Station KCAU-TV at Sioux City would encompass 46,787 persons, which is 4.1% of the total population of 1,129,857 within the Channel 8 Grade B service area; 7.4% of the total population of 634,879 in the Station KCAU Grade B service area; and 2.7% of the total population in the combined service area of the two stations. This range of overlap does not suggest that the allotment here would be incapable of effectuation and therefore Citadel's expression of interest will be fully credited.

[10] The figures in this discussion section covering gains and losses are based on calculations using coordinates for Channel 8 at Lincoln of North Latitude 41-01-10 and West Longitude 97-07-23.

[11] While opposing commenters correctly point out that Lincoln receives reception service from Omaha stations, approval of this petition for rule making is not premised solely on the public interest benefits resulting form the allotment of an additional transmission service at Lincoln. This action will provide a first and second television broadcast service to a significant number of persons. Provision of first reception service fulfills the first of the television allotment priorities, which are: 1) to provide at least one television service to all parts of the United States, 2) to provide each community with at least one television broadcast station, 3) to provide a choice of at least two television services to all parts of the United States, 4) to provide each community with at least two television broadcast stations, and 5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities. *Sixth Report and Order*, 41 FCC 148, 167 (1952).

[12] In adopting Section 1.420(i), which permits changes in community, the Commission specifically stated that it would not consider proposals to change community of license that seek to replace an operating service with a vacant channel. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094, 7097 (1990).

Our engineering analysis indicates that reallotment of Channel 8 to Lincoln, without activation of Channel 18 at Albion as a replacement, would result in a loss of reception service to some 115,643 people who currently receive Albion Channel 8. This would include the creation of a white area of 4,783 square kilometers and 19,362 people, and a gray area of 6,288 square kilometers and 11,262 people.

[13] Even assuming another party applies for Channel 18 at Albion in competition with Citadel, we note that a large number of additional television channels are available for allotment to Albion. In the event that another party applies for Channel 18 who will not promptly provide equivalent replacement ABC network service to Albion, Citadel may seek to invoke procedures for the allotment of an additional channel or channels to ensure that such service is provided and that the conditions for its operation on Channel 8 at Lincoln are fulfilled. *See, e.g., Roseburg, Oregon*, 6 FCC Rcd 4369 (1991).

[14] The coordinates for Channel 8+ at Lincoln are North Latitude 41-01-10 and West Longitude 97-07-23. The coordinates for Channel 18 at Albion are 41-56-00 and 98-17-30.

12. Accordingly, pursuant to the authority contained in Sections 4(i), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1993,** the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel Number
Albion, Nebraska	18, *21+
Lincoln, Nebraska	8+, 10+, *12-, 45, 51

13. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KCAN(TV), Albion, Nebraska, IS MODIFIED to specify operation on Channel 8 at Lincoln, Nebraska, in lieu of Channel 8 at Albion, Nebraska, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

(c) Operation of Station KCAN on Channel 8 in Lincoln, Nebraska, including program test operation pursuant to Section 73.1620, will not be commenced until such time as express authorization from the Commission has been granted. Such authorization will not be granted until a construction permit has been issued for Channel 18 (or an equivalent channel) at Albion, Nebraska, and equivalent replacement ABC network service has been initiated on that channel.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-233

In the Matter of

Amendment of Section 73.202(b), RM-8078
Table of Allotments,
FM Broadcast Stations.
(Campbellsville and
Mannsville, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 6, 1993; Released: April 28, 1993

By the Chief, Allocations Branch:

1. At the request of Patricia Rodgers ("Rodgers"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7159 (1992), proposing the substitution of Channel 260C3 for Channel 260A at Campbellsville, Kentucky, and the reallotment of Channel 260C3 from Campbellsville, Kentucky, to Mannsville, Kentucky. Rodgers also requests the modification of her construction permit for Station WVLC(FM) to specify Mannsville, Kentucky, as its community of license. Rodgers filed supporting comments. Heartland Communications, Inc. ("Heartland"), licensee of Stations WCKQ(FM), Channel 281C3, Campbellsville, Kentucky, filed comments and a counterproposal. Rodgers filed reply comments.[1] After the record closed Heartland filed a reply to Rodgers' comments in opposition to the counterproposal, and Rodgers filed a motion to strike.[2]

2. We believe the public interest would be served by reallotting Channel 260A from Campbellsville, Kentucky to Mannsville, Kentucky, as a Class C3 channel, and by modifying the construction permit for Station WVLC(FM) to specify Mannsville, Kentucky as its community of license. Rodgers has demonstrated that the reallotment would result in a preferential arrangement of allotments. Mannsville, an unincorporated Census Designated Place with a 1990 U.S. Census population of 2,145 persons, will be provided with its first local aural transmission service. Campbellsville (population 9,577) will continue to receive local aural transmission service from Stations WTCO(AM) and WCKQ(FM).

3. Channel 260C3 can be allotted to Mannsville in compliance with the Commission's minimum distance separation requirements at the proposed transmitter site 21.4 kilometers (13.3 miles) south,[3] in order to avoid a short-spacing to Station WDJX(FM), Channel 259B, Louisville, Kentucky. In accordance with Section 1.420(i) of the Commission's Rules, we will modify the construction permit for Station WVLC(FM) to specify Mannsville, Kentucky, as its community of license.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Campbellsville, Kentucky	281C3
Mannsville, Kentucky	260C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WVLC(FM), Channel 260A, IS MODIFIED, to specify operation on Channel 260C3 at Mannsville, Kentucky, in lieu of Channel 260A at Campbellsville, Kentucky, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

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[1] Heartland's counterproposal is technically defective and was not placed on public notice. Heartland's counterproposal proposes to reallot Channel 260A from Campbellsville, Kentucky, to Dunnville, Kentucky, as a first local FM service, and allot Channel 260A to Brownsville, Kentucky, as a first local FM service. Heartland expresses an interest in applying for Channel 260A at Brownsville, Kentucky. The allotment of Channel 260A at Brownsville is contingent on the reallotment of Channel 260A to Dunnville, Kentucky. However, Rodgers has not expressed an interest in applying for and constructing a station at Dunnville or in the modification of its authorization to an alternate community. Absent a timely expression of interest from the permittee, we will not consider the reallotment of Channel 260A to Dunnville. *See Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988), *aff'd*, 4 FCC Rcd 3412 (1989); *aff'd sub nom. Amor Family Broadcasting v. FCC*, 918 F. 2d 960 (D.C. Cir. 1990). Furthermore, Heartland's proposal would require Rodgers to relocate her transmitter site. Absent a statement from the permittee or licensee agreeing to such a proposal, the Commission will not consider the relocation of a transmitter site to accommodate another facility. *See Mt. Morris and Savanna, Illinois, Belle Plaine, Maquoketa, Webster City and Winterset, Iowa*, 4 FCC Rcd 5485 (1989), *recon. denied*, 5 FCC Rcd 2683 (1990). Rodgers' willingness to change her community of license and transmitter site is limited to her proposal to change the community of license for Station WVLC(FM) to Mannsville. Therefore, Heartland's counterproposal is unacceptable for rule making and all responsive comments thereto will not be discussed.

[2] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the unauthorized pleadings.

[3] The coordinates for Channel 260C3 at Mannsville are North Latitude 37-11-00 and West Longitude 85-08-33.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Patricia Rodgers, permittee of Station WVLC(FM) is required to submit a rule making fee in addition to the fee required for the application to effect the change of community of license and upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-113

In the Matter of

Amendment of Section 73.202(b), RM-8212
Table of Allotments,
FM Broadcast Stations.
(Newport, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 7, 1993; Released: April 28, 1993

Comment Date: June 21, 1993
Reply Comment Date: July 6, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Charlotte McNaughton ("petitioner") requesting the substitution of Channel 224C2 for Channel 224C3 at Newport, Oregon, and the modification of Station KCLM's construction permit to specify operation on the higher class channel. Petitioner states her intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 224C2 for Channel 224C3 at Newport since it could enable Station KCLM to expand its coverage area. Channel 224C2 can be allotted to Newport in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.7 kilometers (7.9 miles) north to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify Station KCLM's construction permit to specify operation on the higher class channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Newport or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Newport, Oregon	224C3, 274C1	224C2, 274C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 21, 1993,** and reply comments on or before **July 6, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Margot Polivy, Esq.
Renouf & Polivy
1532 Sixteenth Street, N.W.
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 224C2 at Newport are North Latitude 44-45-22 and West Longitude 124-02-54.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-301

In the Matter of

Amendment of Section 73.202(b), RM-8136
Table of Allotments,
FM Broadcast Stations.
(Henderson, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 6, 1993; Released: April 28, 1993

By the Chief, Allocations Branch:

1. At the request of Dean Broadcasting, Inc. ("petitioner"), licensee of Station KGRI-FM, Channel 260A, Henderson, Texas, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 187 (1993), proposing the substitution of Channel 260C3 for Channel 260A at Henderson and modification of Station KGRI-FM's license to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 260C3, if allotted to Henderson. No other comments were received.

2. We believe the public interest would be served by substituting Channel 260C3 for Channel 260A at Henderson, since it could provide the community with a wide area FM service. Channel 260C3 can be allotted to Henderson in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.3 kilometers (10.2 miles) southwest in order to avoid a short-spacing to the reference coordinates for vacant but applied for Channel 259C2, Shreveport, Louisiana.[1] As proposed, we will also modify petitioner's authorization for Station KGRI-FM to specify operation on Channel 260C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Henderson, Texas	260C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Dean Broadcasting, Inc. for Station KGRI-FM, Henderson, Texas, IS MODIFIED to specify operation on Channel 260C3, in lieu of Channel 260A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Dean Broadcasting, Inc., licensee of Station KGRI-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 260C3 are North Latitude 32-01-20 and West Longitude 94-52-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

GTE California Incorporated — File No. 316MS0015

Notice of Apparent Liability for Forfeiture Penalty for Station KSV982 in the Public Land Mobile Service at Mount Wilson, California

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 23, 1993; Released: April 28, 1993

By the Chief, Mobile Services Division:

1. On July 5, 1990, the Commission granted an authorization to GTE California Incorporated (GTE California) to operate on frequency 158.10 MHz at Mount Wilson, California. The expiration date of the authorization was July 5, 1991. On February 25, 1993, GTE California filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement. The FCC Form 489 included a statement notifying the Commission that construction had been completed and operation had commenced.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities. (FCC Form 489).* When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because GTE California commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that GTE California's failure to file a Form 489 until February 25, 1993, constitutes willful and repeated conduct within the terms of the statute.[1]

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for failing to file required forms is $30,000. The forfeiture is being adjusted downward by $15,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $9,000 because GTE California voluntarily disclosed its failure to file the FCC Form 489. Consequently, a $6,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, GTE California Incorporated IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

7. A copy of this Notice is being sent to GTE California Incorporated, P.O. Box 152092, MC HQWO3J43, Irving, Texas 75015-2092, by Certified Mail, Return Receipt Requested.

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[1] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

GTE California Incorporated — File No. 316MS0016

Notice of Apparent Liability for Forfeiture Penalty for Station KSV982 in the Public Land Mobile Service at Oat Mountain, California

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 23, 1993; Released: April 28, 1993

By the Chief, Mobile Services Division:

1. On July 5, 1990, the Commission granted an authorization to GTE California Incorporated (GTE California) to operate on frequency 158.10 MHz at Oat Mountain, California. The expiration date of the authorization was July 5, 1991. On February 25, 1993, GTE California filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement. The FCC Form 489 included a statement notifying he Commission that construction had been completed and operation had commenced.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities. (FCC Form 489).* When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because GTE California commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that GTE California's failure to file a Form 489 until February 25, 1993, constitutes willful and repeated conduct within the terms of the statute.[1]

4. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC,* No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for failing to file required forms is $30,000. The forfeiture is being adjusted downward by $15,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $9,000 because GTE California voluntarily disclosed its failure to file the FCC Form 489. Consequently, a $6,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, GTE California Incorporated IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Six Thousand Dollars ($6,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

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This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.,* 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BATON ROUGE MSA LIMITED PARTNERSHIP — File No. 07146-CL-MP-91

For facilities in the
Domestic Public Cellular
Radio Telephone Service
on frequency Block B
in Baton Rouge, Louisiana
Market 80B, for station KNKA268

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: April 15, 1993; Released: April 28, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Bureau has before it a Petition for Reconsideration (Petition), filed by Baton Rouge M.S.A. Limited Partnership (Baton Rouge), of a Mobile Services Division (MSD) Order[1] granting the captioned application of Baton Rouge, the Block B licensee in Baton Rouge, Louisiana. The Order also required that Baton Rouge provide roaming service to all cellular telephone users who pass through the areas of the Louisiana 5 and Louisiana 7 Rural Service Areas (RSAs) which Baton Rouge would serve. In its Petition for Reconsideration, Baton Rouge is asking the Bureau to grant its application without the provision imposed by the MSD because Baton Rouge does not want to provide roaming to Baton Rouge Cellular Telephone Company's (BRCTC) customers outside of the Baton Rouge Metropolitan Statistical Area (MSA). For the reasons discussed below, we deny the Petition for Reconsideration and affirm the MSD's decision.

II. BACKGROUND

2. Baton Rouge's application requested expansion of service from its Zachary cell site, located in the northeast corner of the Baton Rouge MSA, by agreed upon contour extensions into the Louisiana 5 (LA-5) and Louisiana 7 (LA-7) RSAs. BRCTC, the Block A licensee in the MSA, and Baton Rouge's competitor, filed a Petition to Deny Baton Rouge's application.

3. BRCTC argued that Baton Rouge's proposed modification was not in compliance with Section 22.911(b) of the Commission's Rules, 47 C.F.R. § 22.911(b), because Baton Rouge was not providing roaming service to all roamers in its agreed upon contour extensions outside of the Baton Rouge MSA (the "extra-MSA area"). BRCTC requested that Baton Rouge's proposed modification be granted only if Baton Rouge agreed to comply with Section 22.911(b) by providing roaming service to BRCTC's customers in the extra-MSA area. The MSD issued an Order granting Baton Rouge's application and also requiring that Baton Rouge provide roaming service to any and all cellular phone customers who pass through the extra-MSA area. Subsequently, Baton Rouge returned to the Commission the authorization issued under the MSD Order because it did not wish to operate in compliance with the condition. *See* Baton Rouge Petition for Reconsideration at 1 n.2. Baton Rouge's Petition addresses the merits of this Order.

III. PLEADINGS AND DISCUSSION

A. Roaming Requirements

4. In its Petition, Baton Rouge argues that the MSD's grant has the effect of imposing a requirement of home roaming because Baton Rouge cannot identify where a BRCTC subscriber is within the cell, and thus, Baton Rouge would be forced to provide roaming service to BRCTC customers in the Baton Rouge MSA (in addition to providing roaming service in the LA-5 and LA-7 RSAs).[2] BRCTC counters that what is required by the Order is roaming in the LA-5 and LA-7 RSAs, which are not home markets for either Baton Rouge or BRCTC subscribers. The language of the Order states:

> The grant of this application is subject to and conditioned upon Baton Rouge MSA Limited Partnership providing roamer service to the cellular subscriber units of Baton Rouge Cellular Telephone Company within the authorized 39 dBu contour extensions into the Louisiana 5 - Beauregard and Louisiana 7 - West Feliciana RSAs.[3]

It is clear from the language of the grant that the MSD requires Baton Rouge to provide roaming in LA-5 and LA-7, *i.e.*, in the extra-MSA area. Baton Rouge seems to argue that the *Baton Rouge Order* has indirectly imposed a roaming-in-the-Baton-Rouge-MSA requirement because Baton Rouge cannot comply with a term of the license (*i.e.*, the provision of roaming in LA-5 and LA-7) without also providing roaming in the area served by the Zachary cell site in the Baton Rouge MSA. This argument does not persuade us to set aside the MSD Order.

5. Baton Rouge also argues that the imposition of home roaming is impermissible without a formal rulemaking procedure. We do not need to reach this claim. As we have already noted, the *Baton Rouge Order* did not establish a new roaming requirement. The Commission's Rules define a roamer as: "A mobile station which communicates with a land station other than one with which it is normally associated." 47 C.F.R. §22.2. The provisions of section 22.911(b) of the Commission's Rules provide, in part, that "base stations must also render service to properly licensed

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[1] Baton Rouge MSA L.P., 6 FCC Rcd 5948 (Mobile Serv. Div. 1991) (*Baton Rouge Order*).

[2] "Home roaming" is the term of art which describes the situation in which a customer who subscribes to one carrier in a market can roam, within that market, on the other carrier's system.

[3] *Baton Rouge Order*, 6 FCC Rcd at 5948.

roamers." 47 C.F.R. §22.911(b). Those rules taken together make it clear that BRCTC's customers are entitled to roaming service from Baton Rouge in the extra-MSA areas. No new requirement is being imposed, and no formal rulemaking procedure was required for the MSD to read and apply the terms of the Commission's Rules. Baton Rouge knew, or should have known the provisions of the Commission's cellular rules when it applied for this modification to its system. Baton Rouge incorrectly concluded that the Rules did not apply to this circumstance. Those rules do apply to this case. Therefore, we reject Baton Rouge's argument.[4]

6. The Commission has always supported the idea of nationwide seamless cellular service. *See Amendment of Part 22 for Unserved Areas*, 6 FCC Rcd 6158 (1991), *modified*, 7 FCC Rcd 2449 (1992), *recon. pending, appeal pending sub nom., McElroy Electronics Corporation v. F.C.C.*, No. 91-1545 (D.C. Cir., filed Nov. 18, 1991). For a cellular customer to experience the advantages of seamless cellular service, licensees must provide roaming. The obligation to provide service to roamers is not a new regulatory burden on the licensee. This interpretation of the existing rule, consistent with the Commission's clearly stated policies, does not constitute a retroactive imposition of a new burden. As no new obligation has been imposed, we reject Baton Rouge's argument that the MSD exceeded its delegated authority.

B. Service in Extra-MSA Areas

7. When the MSD granted Baton Rouge's application, it accepted Baton Rouge's argument that this was not a *de minimis* case because Baton Rouge and the LA-5 and LA-7 licensees agreed to the extensions. However, in its Petition for Reconsideration, Baton Rouge argues that it cannot provide roaming service, and will not serve BRCTC's customers, in the extra-MSA areas because neither it nor the LA-5 and LA-7 licensees is authorized to provide service in the agreed upon extra-MSA areas. Baton Rouge's Petition for Reconsideration sets forth an argument which is an affirmative defense in a *de minimis* case. It argues that its cell was designed to "(1) provid[e] service to portions of the [Baton Rouge] MSA that are presently unserved, and (2) improv[e] service in portions of the MSA that are already served." Baton Rouge Petition for Reconsideration at 5 (footnote omitted). According to Baton Rouge, Commission precedent prohibits contour extensions which are designed to provide service to areas outside the cellular geographic service area (CGSA) and MSA boundaries. *Id.* at 6.

8. Baton Rouge's argument fails, however, because this is not a *de minimis* case. While CGSA boundaries and incidental coverage are important considerations in *de minimis* cases, they are not relevant tests in extension-by-agreement cases.[5] *Bell Atlantic Mobile Systems of Philadelphia*, 2 FCC Rcd 7531 (Mobile Serv. Div. 1987) (in which the MSD held that because there was an agreement between adjacent licensees for the applicant MSA to serve beyond its market the issue of *de minimis* extensions was rendered moot). Accordingly, since this is an extension-by-agreement case and not a *de minimis* extension case,[6] Baton Rouge's arguments are rejected.

9. Baton Rouge argues that it cannot provide roamer service in areas in which it cannot provide any service at all.[7] By grant of Baton Rouge's application, service by Baton Rouge in the extra-MSA areas is authorized. Therefore, Baton Rouge must provide roamer service. As the MSD correctly stated, the privilege of extending a service contour by agreement also imposes a duty on the extending carrier, in the extra-MSA area, to assume all of the obligations of the adjacent licensee. As a result, within the extra-MSA areas, Baton Rouge has all the obligations of the LA-5 and LA-7 licensees.[8] This interpretation ensures that we meet the Commission's objective of nationwide seamless cellular service.

10. It has long been our policy to allow contour extensions when there is agreement between adjacent licensees which are then exempt from review under the Commission's *de minimis* criteria. *Bell Atlantic Mobile Systems of Philadelphia*, 2 FCC Rcd 7531 (Mobile Serv. Div. 1987); *Orange County-Poughkeepsie, Limited Partnership*, 3 FCC Rcd 1191 (Mobile Serv. Div. 1988); *Utica Telephone Company*, 5 FCC Rcd 2791 (Mobile Serv. Div. 1990). Regardless of who is providing the service in the LA-5 or LA-7 market, the obligations of the Commission's Rules apply to that licensee. As we have noted, by providing service in those areas, Baton Rouge has assumed all of the responsibilities that an LA-5 or LA-7 licensee would have. Therefore, Baton Rouge is responsible for providing roaming service to any customer passing through the LA-5 or LA-7 market. The obligation to provide roaming service is not excused because Baton Rouge claims the coverage is

[4] The wording of the MSD Order was imprecise to the extent it indicated that the grant was conditional. The Order merely clarified the terms of the license by requiring the applicant to comply with the Commission's roaming rules. Therefore, the Order's grant is affirmed as modified herein.

[5] Baton Rouge submitted with its application an exhibit and a letter both of which indicated it had the agreement of the LA-5 and LA-7 licensees regarding its service in the extra-MSA areas. This evidence of agreement is sufficient to remove this case from the category of *de minimis* extension cases. We do not need to reach the issue of whether the evidence of an agreement submitted by Baton Rouge constitutes a "contract" between Baton Rouge and the LA-5 and LA-7 licensees. The rules, policies, and requirements described in this Order apply in all cases that cannot be classified as *de minimis* extension cases.

[6] Baton Rouge affirmed, in its opposition to BRCTC's petition to deny, that its contour extensions were the subject of agreements between Baton Rouge and the LA-5 and LA-7 RSAs, respectively, and submitted evidence of an agreement with its application. Baton Rouge, Opposition to Petition to Deny, filed Dec. 21, 1990, at 3.

[7] Baton Rouge claims we cannot allow service by contract without a rulemaking. Baton Rouge Petition for Reconsideration at 8 n.23. We disagree. It is well settled that a licensee may serve agreed upon extension areas with the permission of the licensee in the adjacent market, and this was recently upheld by the Commission. *Utica Telephone Company*, 5 FCC Rcd 2791 (Mobile Serv. Div. 1990), *aff'd, Amendment of Part 22 for Unserved Areas*, 6 FCC Rcd 6185, 6204 (1991), *recon.*, 7 FCC Rcd 7183 (1992). Baton Rouge's claim is, therefore, without merit.

[8] It would be unfair to allow Baton Rouge to deprive BRCTC's customers of roamer service merely because Baton Rouge has the advantage of being able to expand its contours by agreement.

"merely incidental." The question of whether the coverage is "incidental" is not relevant here. Accordingly, we reject Baton Rouge's argument.

11. Finally, Baton Rouge argues that its CGSA stops at the MSA boundary, and that, therefore, it may not provide service to BRCTC's customers in the LA-5 and LA-7 markets. Yet, Baton Rouge has admitted it has coverage in the extra-MSA areas. Where Baton Rouge provides authorized service, it must comply with all of the Commission's Rules. Consequently, we reject its argument regarding its CGSA boundary as a valid reason for denying roaming in the extra-MSA areas. Baton Rouge was authorized to operate the Zachary cell site in accordance with the technical parameters it requested. If the Commission grants an authorization for a cellular facility, the licensee is permitted to serve any cellular customers who receive its signal when the licensee operates in compliance with the technical parameters of that authorization. Where Baton Rouge provides service, outside of the MSA pursuant to an extension agreement, it must assume all of the obligations of a licensee in the area it is serving.[9] Those obligations include providing roaming to BRCTC's customers. Clearly, when the MSD conditionally granted Baton Rouge's application it authorized service in all of the area proposed to be covered by the Zachary cell.

12. While it is true that the Baton Rouge CGSA stops at the MSA border, a CGSA is defined for purposes of offering interference protection to a licensee. *See Amendment of Part 22 for Unserved Areas*, 7 FCC Rcd 2449 (1992), *recon.*, 7 FCC Rcd 7183 (1992); *see also* 47 C.F.R. § 22.903. Here, there is an agreed upon extension, and the RSA licensees, by agreeing to allow Baton Rouge to serve portions of their markets, secure interference protection for Baton Rouge's contours there. Once again, this means that Baton Rouge steps into the shoes of the RSA licensees and must provide all of the service that those licensees must provide, including roaming service to BRCTC's customers. The agreed upon contours in the extra-MSA areas are not part of Baton Rouge's CGSA, but they are, nonetheless, areas in which Baton Rouge is authorized to provide service; therefore, Baton Rouge - in its provision of service in those areas - is subject to all cellular rules and regulations, including roaming requirements.

IV. CONCLUSION AND ORDERING PARAGRAPHS

13. For the reasons set forth above, we are affirming the decision of the MSD. We also find, however, that stating that the grant was conditioned was erroneous since that the *Baton Rouge Order* merely had the effect of specifying the terms of the license which requires Baton Rouge to provide roaming service in the extra-MSA areas.

14. IT IS HEREBY ORDERED THAT the Petition for Reconsideration filed by Baton Rouge MSA Limited Partnership in the captioned proceeding IS DENIED.

15. IT IS FURTHER ORDERED THAT the decision of the Mobile Services Division granting the application in the captioned proceeding IS AFFIRMED. The language contained in the license which clarifies the terms thereof will remain on the license.

16. IT IS FURTHER ORDERED THAT the licensee must notify the Commission within 30 days of the release date of this Order that it accepts the license (which it returned to the Commission) as it was granted under the *Baton Rouge Order*, or the license will be cancelled.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[9] Where a licensee has the ability to serve customers outside of its market, as in this agreement case, the licensee must provide roaming service to any roamer.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-263

In the Matter of

Implementation of Section 8 of
the Cable Television Consumer
Protection and Competition Act of 1992

Consumer Protection and
Customer Service

REPORT & ORDER

Adopted: March 11, 1993; Released: April 7, 1993

By the Commission: Commissioner Marshall not participating.

Table of Contents

	Paragraphs
I. Introduction	1-3
II. Establishment and Implementation of Customer Service Standards	
A. Background	4-5
B. Adoption of Customer Service Standards	6-12
C. Enforcement of Customer Service Standards	13-21
D. Effective Date of Customer Service Standards	22-26
III. Customer Service Standards	
A. Background	27
B. Federal Customer Service Standards	28-37
1. Definitions	38-45
2. Office Hours and Telephone Availability	46-56
3. Installations, Outages, And Service Calls	57-64
4. Communications, Bills and Refunds	65-68
C. Other Standards	69
IV. Administrative Procedure Act	70-71
V. Administrative Matters	72
VI. Ordering Clauses	73-75
Appendices	

I. INTRODUCTION

1. By this *Report & Order*, the Commission implements Section 632 of the Communications Act of 1934 (47 U.S.C. Sec. 632) ("Communications Act"), as amended by Section 8 of the Cable Television Consumer Protection and (Competition Act of 1992 ("Cable Act of 1992" or "1992 Act").[1] That provision governs the establishment, implementation and enforcement of customer service standards for cable operators nationwide. In the *Notice of Proposed Rule Making* in this proceeding, the Commission solicited public comment on issues concerning the implementation of Section 8 of the Cable Act of 1992. *See Notice of Proposed Rule Making* in MM Docket No. 92-263, 7 FCC Rcd 8641 (1992) (*"Notice"*). A list of those parties commenting in this proceeding is attached hereto as "Appendix A."

2. Section 632 of the Communications Act, as amended by Section 8 of the Cable Act of 1992, provides:

> (a) FRANCHISING AUTHORITY ENFORCEMENT.- A franchising authority may establish and enforce-
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> (1) customer service requirements of the cable operator, and
>
> (2) construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator.
>
> (b) COMMISSION STANDARDS.- The Commission shall, within 180 days of enactment of the Cable [Act of 1992], establish standards by which cable operators may fulfill their customer service requirements. Such standards shall include, at a minimum, requirements governing-
>
> (1) cable system office hours and telephone availability;
>
> (2) installations, outages, and service calls; and
>
> (3) communications between the cable operator and the subscriber (including standards governing bills and refunds).
>
> (c) CONSUMER PROTECTION LAWS AND CUSTOMER SERVICE AGREEMENTS.-
>
> (1) CONSUMER PROTECTION LAWS.- Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title.
>
> (2) CUSTOMER SERVICE REQUIREMENT AGREEMENTS.- Nothing in this section shall be construed to preclude a franchising authority and a cable oper-

[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, Section 8, 106 Stat. 1460 (1992).

> ator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b). Nothing in this title shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.

3. As set forth in detail below, we will establish customer service standards in the areas delineated by Section 632(b)(1)-(3) of the Communications Act, as amended by Section 8 of the Cable Act of 1992. These standards will become effective on a nationwide basis on July 1, 1993. They will then be enforced by local franchising authorities, which will be required to provide cable operators with 90-days written notice of their intent to so enforce. Franchise authorities may agree with cable operators to adopt stricter standards and may enact any state or municipal law or regulation which imposes stricter or additional customer service standards to those set by this Commission. Moreover, the Commission's customer service standards do not necessarily supersede existing customer service requirements in current franchise agreements. Since local authorities will be enforcing customer service requirements, this Commission will have a limited role in enforcement matters.

II. ESTABLISHMENT AND IMPLEMENTATION OF CUSTOMER SERVICE STANDARDS

A. Background

4. We first address the establishment of Federal customer service standards, the process by which customer service standards become service requirements applicable to franchised cable television system operators, and the enforcement of those service obligations. We conclude that the resolution of these issues should be guided by the key objective of Section 8 of the 1992 Act; that is, to ensure that cable operators nationwide provide satisfactory service to their customers. In this regard, both the Senate and House Committee Reports recognize that although franchise authorities may presently establish customer service standards in franchise agreements, some cable operators have nevertheless provided inconsistent and unsatisfactory levels of customer service.[2] The Cable Act of 1992 is intended, in part, to address these concerns by requiring the Commission to establish standards by which cable operators may fulfill their customer service obligations (47 U.S.C. Sec. 632(b)), and by enhancing the ability of local franchise authorities to enforce mandatory levels of customer service (47 U.S.C. Sec. 632(a)).

5. In general, comments on the establishment, implementation and enforcement of customer service standards were largely divided between local governments and municipalities (and representative organizations), on the one hand, and cable operators (and representative industry associations) on the other. For their part, local government interests generally favor self-executing Federal standards immediately applicable to cable system operators. By contrast, cable interests typically contend that franchise authorities must take affirmative action, consistent with and limited by existing franchise agreements, to impose and enforce customer service requirements. Most commenting parties saw little, if any, active enforcement role for this Commission beyond establishing Federal standards for customer service. Because the interplay among the separate provisions of Section 632 of the Communications Act, as amended by the Cable Act of 1992, defines the scope of adoption and enforcement of customer service standards, those provisions are addressed both individually and collectively below.

B. Adoption of Customer Service Standards

6. In the *Notice*, we tentatively concluded that the Cable Act of 1992 requires this Commission only to establish customer service standards that may be adopted by State and local governments. We asked interested parties to comment on this premise, on how Congress intended the customer service standard-setting process to function, and on the specific mechanism(s) whereby customer "service standards" become "service requirements" for local cable system operators.[3] We also solicited comment on whether customer service standards promulgated by the Commission were in any sense self-executing or, if not, what actions must be taken by a local franchise authority to impose and enforce service requirements on cable operators.

7. The National Association of Telecommunications Officers and Advisors, *et al.* ("NATOA"), filing on behalf of "local governments," maintains that the Commission-established service standards should be self-executing and applicable to all cable systems as of the date of adoption by the FCC without any further action required to be taken by franchise authorities.[4] It contends that the Federal customer service standards should apply to all cable operators unless: (1) a franchise authority decides to waive one or more of the FCC's standards in favor of less stringent requirements;[5] (2) the existing franchise agreement already

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[2] *See* Senate Comm. on Commerce, Science and Transportation, S. Rep. No. 102-92, 102d Cong., 2d Sess. at 20 (1992) ("Senate Report"); House Comm. on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 34-35, 105 (1992) ("House Report").

[3] *Notice*, 7 FCC Rcd at 8642-43, paras. 4-7.

[4] NATOA comments at 2. NATOA suggests that if franchise authorities were required to take affirmative action to adopt the Commission-established standards, "they would undoubtedly face a barrage of piecemeal cable industry challenges, on a jurisdiction-by-jurisdiction basis. . . [which] would only delay the protection Congress intended to provide to cable consumers, undermine the Congressional goals of requiring national customer service standards, and unnecessarily waste local resources." *Id.* at 10.

[5] In such a case, NATOA would have the franchise authority provide a succinct, written notice of its action to the Commission which, after seeking further comment, could override the decision. *Id.* at 14. The Municipal Franchising Authorities ("MFA"), at page 6 of its comments, suggest that only franchise authorities should be permitted to seek waivers of the FCC-established standards. However, Metropolitan Dade County ("Dade County") disagrees that franchise authorities should have the authority to waive the Federal standards in favor of

includes more stringent customer service standards (less stringent standards already in place would be superseded by the Federal standards);[6] or (3) a franchise authority promulgates more stringent or different standards pursuant to State or municipal consumer protection laws.[7]

8. In contrast, most owners and operators of cable television systems, as well as the National Cable Television Association ("NCTA") and the Community Antenna Television Association, Inc. ("CATA"), two trade associations representing cable owners and operators, contend that there is nothing in the Cable Act or its legislative history to suggest that the customer service standards to be established by this Commission are in any way self-executing or will govern cable operators in the absence of some affirmative action by franchise authorities to adopt them (*i.e.*, there is no Federal standard "by default").[8] In essence, these parties interpret Section 632, as amended by the Cable Act of 1992, as providing three alternatives for the imposition of customer service standards: (1) local adoption of the FCC-established standards;[9] (2) the setting of different (greater or lesser) service standards by mutual agreement between the franchise authority and the cable operator;[10] or (3) the enactment of State or municipal consumer protection laws, ordinances or regulations of "general applicability" (*i.e.*, not cable-industry specific).[11] These commenters generally maintain that existing customer service requirements in current franchise agreements should be grandfathered.[12] Most of these commenters also assert that franchising authorities must put cable operators on notice of the imposition of any customer service standards, and Comcast Corporation *et al.* ("Comcast") maintains that cable operators must be given notice and an opportunity to oppose adoption of the Federal standards where, due to the characteristics of an individual system and its marketplace, implementation of those standards would adversely affect the operations of the system or require an increase in rates.[13]

9. Viacom International Inc. *et al.* ("Viacom"), which suggests that the Federal customer service standards be imposed on all video programming distributors, advances the following three-phase implementation approach: (1) immediate adoption by the FCC of self-executing basic national standards (a national "floor") to guarantee service quality in communities without formal standards while more comprehensive national standards are developed; (2) more comprehensive standards (based on existing NCTA voluntary guidelines) adopted by the FCC, which local authorities would be free to adopt, to become effective one

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less stringent standards. It believes that franchise authorities will be unduly pressured by cable operators to lower standards or face piecemeal challenges. Dade County reply comments at 3.

[6] *See, e.g.*, MFA comments at 9-10; Attorneys General of Pennsylvania, Massachusetts, New York, Ohio and Texas ("Attorneys General") comments at 5 (existing service requirements should be preempted only to the extent that they fall below the Federal standards). These parties maintain that there is no authority in the Cable Act of 1992 to grandfather less strict standards than those established by the FCC. *But see* City of Dallas ("Dallas") comments at 2-3 (all current customer service requirements contained in existing franchise agreements should be grandfathered to preserve mutually acceptable agreements already in place).

[7] NATOA comments at 2-5.

[8] NCTA comments at 20. Continental Cablevision, Inc. ("Continental") believes that the FCC's standards should not be "codified" in the Commission's rules, highlighting the discretionary nature of franchise authorities' decision to adopt them. Continental comments at 45, n.27. Additionally, NCTA suggests that self-executing Federal standards would penalize those operators that have already devoted extensive resources to achieve high levels of customer satisfaction under existing franchise agreements. NCTA reply comments at 9.

[9] Time Warner Entertainment Company, L.P. ("Time Warner") and Comcast Corporation *et al.* ("Comcast") maintain that Section 632(a) of the Communications Act is an enabling provision allowing franchise authorities to adopt the FCC-established standards *if* the existing franchise agreement would otherwise preclude such action. They further assert that franchise authority adoption of the Federal standards is discretionary, not mandatory. Time Warner comments at 9-10; Comcast comments at 5-6. However, these commenters also maintain that this authority is limited to adoption of the Federal standards, and does not permit the amendment of existing franchise agreements to impose standards that exceed those established by the FCC or to confer additional enforcement powers other than those already in place in existing agreements. See paragraph 17, *infra*.

[10] Time Warner and other commenters interpret Section 632(b) as permitting a cable operator to fulfill customer service responsibilities by complying with the FCC-established standards, effectively requiring mutual consent between a cable operator and franchise authority for deviations therefrom. *See* Time Warner reply comments at 6. Local governments, on the other hand, do not view the FCC standards to be established under Section 632(b) as the exclusive mechanism to satisfy customer service obligations; NATOA suggests that the Federal standards "may" be one way to fulfill customer service requirements, but only if the franchise authority does not require more. NATOA reply comments at 7-9.

[11] These commenters believe the last clause of Section 632(c)(2) must be directed to laws of general applicability because, they allege, any other interpretation would have the effect of allowing unilateral imposition of higher standards on cable operators, a result not otherwise provided for in the statute. *See, e.g.*, NCTA comments at 20; CATA comments at 5-7. They additionally maintain that if franchising authorities could unilaterally impose higher standards, the statutory provision for cable operator consent for the imposition of standards exceeding the Federal model would be negated. *See, e.g.*, Continental comments at 48-50. Local governments, on the other hand, generally argue that neither the language of Section 632 nor its legislative history indicates a Congressional intent to limit State or local consumer protection laws to those of general applicability. *See, e.g.*, NATOA reply comments at 9, n.5.

[12] *See, e.g.*, Cole, Raywid & Braverman ("CRB") comments at 3; NCTA comments at 25-27. Comcast maintains that franchise authority enforcement power is limited to those mechanisms contained in existing franchise agreements and any changes implemented in the context of a franchise renewal. Comcast comments at 11-12.

[13] Comcast comments at 3. Comcast also maintains that franchising authorities should be required to demonstrate the need for standards that exceed the FCC-established standards, and should show that this need outweighs the associated costs. Comcast would also allow cable operators to file petitions for special relief with the Commission demonstrating that adherence to excessive customer service standards is inconsistent with the objective of reasonable rates. *Id.* at 8-11. In response, local governments maintain that lengthy implementation processes are contrary to the intent of Congress to provide immediate relief for substandard customer service. *See, e.g.*, NATOA reply comments at 6.

year after adoption; and (3) negotiation of standards that exceed the FCC standard at the franchise renewal or at "interim negotiation sessions."[14]

10. *Discussion.* As the record in this proceeding reveals, the language of Section 632 of the Communications Act, as amended by Section 8 of the 1992 Cable Act, does not clearly dictate the precise mechanism by which customer service requirements are to be adopted. However, we believe that the implementation scheme most consonant with the language of the statute and Congress' intent is for this Commission to establish self-executing standards which set forth the customer service obligations of cable operators nationwide. Section 632(b) provides that the Commission "*shall* . . . establish standards by which cable operators may fulfill their customer service requirements" (emphasis added). Although Section 632(a) states that a local franchise authority also "may establish and enforce" customer service requirements, we believe that this provision should be read in conjunction with Section 632(c), which expressly permits local governments to adopt standards exceeding those established by the Commission either with the consent of the cable operator or by enactment of an appropriate law or regulation. Thus, reading all three provisions together, we conclude that the Commission is required to establish baseline customer service standards on which local governments may rely to ensure that the cable systems they regulate provide an adequate level of customer service to cable subscribers. At the same time, Sections 632(a) and (c) preserve the ability of local governments to exceed the FCC standards through the franchising or regulatory process when additional obligations are deemed necessary.[15] Accordingly, we agree with NATOA, most local governments and other commenters that the customer service standards we establish today should be self-executing.

11. We recognize the concerns of some commenters regarding the difficulty of promulgating uniform national standards that will govern the customer service obligations of cable systems nationwide. We particularly acknowledge our concern regarding smaller cable systems that have limited subscriber bases, since the costs of imposing the FCC-established standards on these systems may have a significant impact on rates. As discussed in Section III(B) below, however, we believe that we have developed customer service standards that are both reasonable and sufficiently flexible to accommodate the range of cable operations to which they will be applied. With respect to the issue of adopting a flat exemption for small cable systems, we observe that there is little consensus among the commenting parties as to whether such an exemption is needed[16] and, if so, how it should be designed.[17] To the extent that the flexibility in our standards may not accommodate some small systems without an undue adverse impact to subscribers, we believe that the better approach is to encourage small systems to seek waivers of our standards should they conclude that one or more of those standards is too onerous.[18] In this regard, we will consider small systems to be those with 1,000 or fewer subscribers, since it is these cable systems that we previously have recognized face special difficulties in meeting Federal regulatory requirements.[19]

12. Should local governments wish to exceed the customer service standards we adopt today, they may do so through the franchising process or otherwise with the con-

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[14] Viacom comments at 2-5. In its reply comments, Viacom emphasizes that, unless a cable operator and franchise authority mutually agree to customer service requirements that exceed the Federal standards, any such standards should be justified to or approved by this Commission. Viacom reply comments at 2. In those situations in which a renegotiation is not scheduled to occur within a reasonable time frame, Viacom suggests that more stringent customer service standards should be addressed in waiver requests to the FCC. If the Commission determines that more stringent service standards should be imposed without negotiations, it requests that cable operators be permitted to pass the added costs of compliance through to subscribers without local rate approval. *Id.* at 6.

[15] The legislative history supports this interpretation. The customer service provision adopted by Congress is virtually identical to the provision in H.R. 4850. The House Committee Report on that bill states that the Commission shall promulgate "minimum Federal standards for customer service and consumer protection." House Report at 37. *See also* Statement of Chairman John Dingell, 138 Cong. Rec. H6500 (daily ed. July 23, 1992) (statute "requires the FCC to come up with tough customer service standards -- and provides for effective enforcement"); Statement of Chairman Edward Markey, 138 Cong. Rec. E1034 (daily ed. April 10, 1992) (draft legislation would "require the FCC to establish universal customer service standards").

[16] Commenting parties ranged from no blanket exemptions based on numbers of subscribers (*See, e.g.,* the City of St. Louis reply comments at 18) to total or partial service exemptions for systems under 15,000 subscribers (Viacom comments at 9-11); those under 10,000 (NCTA comments at 32-33); those under 1,000 (Coalition comments at 2-3); or those with gross revenues below 7.5 million dollars (Consortium comments at 2-4). In addition, some commenters would permit waiver or exemption from service requirements only for wholly owned, stand-alone systems. *See, e.g.,* NATOA comments at 16-17. *But see* CATA reply comments at 3-4 (distinctions between stand-alone and multiple operator systems inappropriate because service requirements must make financial sense on community-by-community basis).

[17] Commenting parties range in their suggestions from the FCC acting on waiver requests made by franchise authorities (MFA comments at 13-14) or system operators (NCTA reply comments at 10), to franchising authorities implementing their own small system standards (New York State Commission on Cable Television ("NYSCCT") comments at 11-12), to exemptions by mutual agreement of the franchise authority and the cable operator (National Telephone Cooperative Association comments at 4-5). In addition, NCTA requests that the Commission recognize that smaller systems may be less able to comply with all of the Federal standards, and urge franchising authorities to take that into account when developing and applying customer service standards. NCTA comments at 32-33.

[18] When submitting such waiver requests, small cable operators should attach the views of the local franchising authority on the request and provide a detailed explanation as to the costs of compliance for each of the specific Federal standards for which a waiver is sought. In granting waiver requests, our preference clearly will be to approve an alternate standard rather than waive a standard altogether. Therefore, the system seeking a waiver of our standards should propose any alternative standard(s) with which it could comply in the event the request is favorably considered. The alternative standard(s) proposed should be crafted to best meet, under the circumstances, the statutory objectives and should track, as best as possible, the FCC-established standards. In addition, the waiver request should, where possible, include a projected date when full compliance with the FCC standard can be achieved.

[19] *See, e.g., Cable Television Technical and Operational Requirements,* 7 FCC Rcd 2021, 2033-34, *recon. granted on other grounds,* 7 FCC Rcd 8676 (1992).

sent of the cable operator, or they may enact an appropriate law or regulation.[20] In this latter regard, we find that Section 632(c) of the Communications Act does not prevent the enactment and enforcement of any State or municipal law or regulation concerning consumer protection or customer service which imposes service requirements that exceed, or involve matters not addressed by, the Federal standards. We note that a number of commenters assert that any such laws must be generally applicable to businesses in the community -- *i.e.*, they cannot be "cable specific."[21] In support of this interpretation, these parties claim that Congress did not intend for local governments to be able to "unilaterally" impose stricter standards on cable operators. We disagree. There is nothing in the statutory language or legislative history which suggests that Congress meant to limit consumer protection or customer service laws in this manner. Moreover, franchise authorities will not be able to enact consumer protection or customer service laws or regulations without following the procedural requirements attendant to the political process. Cable operators will thus have ample opportunity to present their views and all relevant information to the local government and the public before any such State or municipal regulation is passed.

C. Enforcement of Customer Service Standards

13. In the *Notice*, we tentatively concluded that, following the historical pattern that customer service standards have not been imposed or enforced at the Federal level, the Cable Act of 1992 provides the Commission with no role in the enforcement of its own or any other customer service standards.[22] Interested parties were asked to comment on whether the Commission should have any role with regard to customer service once it establishes the Federal standards.[23]

14. Most commenters believe that Section 632 does not provide a direct or active role for the FCC in the enforcement of customer service obligations. Local governments generally suggest that local enforcement by franchise authorities is the only logical and appropriate course;[24] cable interests generally take the position that since local authorities must adopt standards, they must enforce them consistent with existing franchise agreements. Virtually all commenters maintain that local enforcement offers the flexibility necessary to properly meet individual community needs.

15. NATOA views local authorities and this Commission as sharing the responsibility of implementing customer service standards. It suggests that franchising authorities would shoulder the administrative burdens of enforcement, including setting time-frames for and overseeing local compliance,[25] establishing appropriate methods to measure cable operator compliance,[26] reviewing individual subscriber complaints, establishing penalties for violations,[27] and imposing specific billing and collection procedures.[28] It states that franchise authorities would be primarily responsible for enforcing the standards and would submit written reports of their enforcement actions to the FCC, which could act as a final arbiter of disputes.[29] In response, Continental believes that NATOA's approach would create difficult and unnecessary administrative burdens on the FCC, requiring increased staff and resources in an area where Congress has given the FCC no enforcement authority.[30]

16. Other commenters advocating some enforcement role for the FCC would limit that role to reviewing and, if necessary, adjusting the Federal standards it adopts.[31] As previously noted, Comcast maintains that special relief petitions should be available to cable operators who can demonstrate that adherence to excessive standards is inconsistent with the Cable Act objectives of reasonable rates. Similarly, Continental suggests that while there is no formal role for the FCC, it may interpret the Federal standards, if questions arise, through special relief petitions or requests for declaratory rulings.[32] Viacom suggests that conflicts in standards among various franchise authorities covering geographically close or multiple franchise areas should be resolved at the FCC or by the affected cable

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[20] Because there is no indication that Congress intended for more stringent requirements already included in existing franchise agreements to be relaxed as a result of our actions today, such pre-existing franchise terms will be grandfathered through the end of the franchise term.

[21] *See* note 11, *supra*.

[22] 7 FCC Rcd at 8642, para. 4.

[23] *Id.* at 8643, para. 7.

[24] Dallas suggests that if the Federal standards preempt prospective or existing locally established standards, then the FCC should accept and resolve all complaints. Dallas comments at 3-4.

[25] NATOA comments at 10-13.

[26] *See also* Northwest Municipal Cable Council ("Northwest") comments at 4. Some commenters suggest that franchise authorities should be free to establish appropriate record-keeping requirements for cable operators in order to assess compliance. *Id. See also, e.g.*, City of Miami Beach ("Miami Beach") comments at 8; Fairfax County reply comments at 10 (cable operators should submit to the FCC an annual report summarizing compliance).

[27] *See also*, Miami Beach comments at 6-8. However, Continental suggests that no authority is statutorily conferred on franchise authorities to assess penalties and fines. Continental comments at 47, n.31. In response, NATOA claims that while cable operators generally agree that local authorities are the appropriate entities to enforce customer service standards, by linking implementation of enforcement processes to the franchise process, franchise authorities would not be provided meaningful mechanisms to ensure such enforcement. NATOA reply comments at 10-13.

[28] NATOA comments at 14, 25-27.

[29] *Id.* at 2, 10-14. NATOA would have the FCC retain appellate-like jurisdiction to review local enforcement actions involving the Federal standards. In addition, it would preclude cable operators from having direct recourse to the FCC. It would require that, prior to Commission review of a particular complaint of a cable operator or subscriber, a franchise authority first certify that the complaint or issue meets jurisdictional tests for FCC review. *See* note 32 *infra*.

[30] Continental reply comments at 8-9. *See also* CATA reply comments at 6.

[31] The Chief Counsel for Advocacy, U.S. Small Business Administration ("USSBA"), in its comments at 3, n.3, suggests that the FCC issue a Notice of Inquiry after it establishes the Federal standards to determine whether the standards need modifications or additions.

[32] Comcast comments at 10. *See also* Continental comments at 47. On the other hand, NATOA suggests that in order for a cable operator or customer to obtain recourse to the FCC, a franchise authority must first certify that the complaint or question is appropriate for Commission review because it implicates national policy considerations or involves a systemic and continuous pattern of conduct that can not otherwise be resolved at the local level. NATOA comments at 9-14. *See also* Fairfax County reply comments at 8-9.

operator(s). It also maintains that the FCC should establish a complaint process when there is no franchise authority with enforcement jurisdiction.[33]

17. Most cable interests maintain that customer service standards imposed on cable operators should be directed at ensuring adequate levels of customer service on an aggregate performance, system-wide basis. These commenters oppose any individual complaint resolution process, maintaining that enforcement mechanisms that focus on individual complaints would result in significant administrative burdens and costs in the pursuit of an unattainable and illusory goal of customer service perfection.[34] Time Warner believes that franchise authorities should be limited to enforcing customer service standards pursuant to enforcement procedures that already exist in franchise agreements, those procedures mutually agreed upon by the franchise authority and the cable operator, or pursuant to existing renewal provisions, contained in Section 546(c)(1)(B) of the Communications Act (47 U.S.C. Sec. 546(c)(1)(B)), which permit franchise authorities to consider the quality of an operator's service, including complaint responsiveness and billing practices.[35] While some commenters suggest that no authority is statutorily conferred on franchise authorities to assess penalties and fines,[36] others request that the FCC limit penalties to actual subscriber losses and prohibit punitive damages and continuing violations assessments.[37] These commenters also suggest that the FCC should limit a franchise authority's penalty powers to those instances where the cable operator has been given an opportunity to correct a deficiency. TCI maintains that the FCC should establish "enforcement principles" to which franchising authorities must adhere, including measurement (and reasonable penalties) based on aggregate performance, due process and an opportunity to cure.[38]

18. NATOA asserts that the Commission should permit franchising authorities to fashion a wide range of remedies for noncompliance with customer service requirements.[39] Specific local governments vary in their comments concerning the actual penalties that should be applied in cases of non-compliance. Some local governments, such as the Cities of Miami Beach, Florida, and Dallas, Texas, request that the Commission establish (or grandfather in existing franchise agreements provisions for) specific monetary penalties (in the form of refunds, rebates or credits) for violations of customer service standards. The New York State Commission on Cable Television ("NYSCCT") suggests that, where enforcement powers are limited or unavailable to franchise authorities under existing franchise agreements, this Commission should make its standards immediately applicable to cable operators (subject to franchise authority notification to the cable operator) for purposes of making compliance thereunder a legitimate subject of review at franchise renewal or to allow franchise authorities to compel performance through local actions for specific performance or injunctive relief.[40]

19. *Discussion.* Section 632(a) of the Communications Act, as amended by Section 8 of the 1992 Cable Act, preserves the current ability of a franchise authority to enforce the customer service requirements of a cable operator.[41] Specifically, Section 632(a) expressly provides that "a franchise authority may establish and enforce" customer service requirements and construction schedules. Section 632(b), in delineating the FCC's involvement in establishing customer service standards, provides this Commission with no specific enforcement role. As a result, it does not appear that Congress intended for the Commission to bear the responsibility of enforcing the new FCC standards. In addition, we believe that as a practical matter, customer service requirements can be enforced most efficiently and appropriately on a local level where such enforcement historically has occurred. Accordingly, we conclude that the customer service standards we adopt today should be enforced by local franchise authorities.[42] However, consistent with our overall obligation to effectuate the reforms mandated by the 1992 Cable Act, we retain the authority to address, as necessary, systemic abuses that undermine the statutory objectives.

20. As a general principle, specific customer service requirement enforcement mechanisms and processes are to be determined by the franchise authorities, and will be applicable to cable operators upon notification.[43] To the extent that existing franchise agreements may prohibit franchise authority enforcement of customer service standards, such provisions are preempted by the Federal statute. A franchise authority that chooses to enforce the FCC stan-

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[33] Viacom comments at 14-15. Viacom would also have the FCC establish a complaint process to deal with standards that it believes should be made applicable to *all* video program distributors, regardless of whether such operators are subject to the jurisdiction of local franchise authorities.

[34] TCI comments at 20-21; Time Warner comments at 14-15; NCTA comments at 19.

[35] Time Warner comments at 14-15.

[36] *See, e.g.,* Continental comments at 47, n.31; TCI comments at 21, n.27.

[37] *See, e.g.,* NCTA comments at 31-32; TCI comments at 21.

[38] TCI comments at 18-22.

[39] NATOA comments at 27. NATOA also requests that franchise authorities be permitted to obtain, in addition to aggregate performance data, specific information regarding individual subscriber complaints to the cable operator. It believes that such information will assist local franchise authorities to monitor compliance and arrive at effective enforcement mechanisms. NATOA reply comments at 12, n.8.

[40] NYSCCT comments at 6-7. *See also* MFA comments at 12. In response, TCI states that NYSCCT's plan for the imposition of the FCC standards for some purposes but not others is unworkable, highlights the difficulty of enforcing standards for which no prescribed penalties exist for noncompliance, and confuses the issue of local adoption of the Commission's standards with amending existing cable franchises. TCI reply comments at 5-6.

[41] We decline to subject unfranchised video program distributors to the Federal customer service standards as suggested by Viacom. Neither the statute nor its history supports FCC or local adoption or enforcement of such standards with regard to unfranchised program distributors, and we believe that such an approach is unnecessary and impractical. Of course, nothing herein prevents the enforcement of local consumer protection or customer service laws applicable to such service providers.

[42] We emphasize that the Commission's customer service standards do not necessarily supersede customer service requirements in existing franchise agreements. *See* note 20, *supra*. Of course, should the franchise authority elect to enforce the FCC standards, customer service requirements not meeting these standards contained in the franchise agreement will be superseded.

[43] *See* discussion at para. 26, *infra*.

dards may do so pursuant to the rules and principles adopted herein, and may unilaterally modify the franchise agreement to the extent necessary or desirable to implement local enforcement of the FCC's customer service requirements. Of course, franchise authorities may also enforce service requirements either pursuant to the terms of an existing franchise agreement which provide for effective enforcement; with the consent of the affected cable operator; pursuant to applicable State or municipal consumer protection or customer service law or regulation; or pursuant to the franchising process.

21. We also believe that it is unnecessary for this Commission to establish specific customer service reporting requirements or refund or penalty guidelines applicable to all cable operators nationwide. In this regard, some local governments and cable operators appear to be satisfied with various customer service enforcement mechanisms already in place. Moreover, there is nothing in the record to indicate that State or municipal consumer protection or customer service laws or regulations are inappropriate to enforce customer service requirements; in fact, such laws are often the traditional method of local enforcement actions. In contrast, adoption of Federal enforcement standards could preempt local enforcement mechanisms and hamper effective local enforcement of customer service requirements. Similarly, and based on the record before us, we do not believe that it is appropriate for the Commission to establish specific, universally applicable remedies or penalties for operators that do not comply with their customer service obligations. Local governments should be free to avail themselves of reasonable remedies to assure compliance and fairness to all parties. Such remedies could include, for example, ordering credits or refunds to the system's subscribers.[44] Local governments are likewise free to pursue nonmonetary forms of relief to assure customer satisfaction including, but not limited to, local actions to compel specific performance or performance evaluation at franchise renewal. We would expect that overall system-wide compliance based on aggregate performance will be a fundamental concern to franchise authorities, but we do not believe it is appropriate to preclude local resolution of individual subscriber complaints that cannot be resolved between the cable operator and its customer.[45]

D. Effective Date of Customer Service Standards

22. In the *Notice*, we tentatively concluded that it is unlikely that the Congress intended for no changes in customer service requirements to occur prior to the expiration of each current franchise term.[46] Accordingly, comment was sought on the impact of the statutory provisions on existing franchise agreements, particularly as to whether Section 632(a) permits franchising authorities to modify existing franchise agreements prior to renewal. Interested parties were also asked to comment on when, pursuant to the Cable Act of 1992, local governments may impose new service standards and the extent to which customer service provisions in existing franchise agreements can or should be grandfathered or might be superseded by the Federal service standards.[47]

23. As noted previously, most local governments maintain that the FCC-established standards are self-executing and, once effective, are immediately applicable to cable operators until a franchise authority takes independent action imposing and enforcing different or additional customer service requirements.[48] These commenters argue generally that Section 632(a), as amended by the Cable Act of 1992, changes the former Section 632(a) (*i.e.*, as amended by the Cable Act of 1984) by removing any limitation as to when customer service requirements may be added to the terms of a franchise.[49] They suggest that such a plain reading of the statute comports with Congressional objectives to immediately protect consumers, particularly in areas where consumer standards are not currently in place.[50]

24. In contrast, most cable operators contend that any new customer service standards to be adopted by local authorities may only be imposed after the expiration of existing franchise agreements.[51] These commenters suggest that the imposition of new customer service requirements in mid-term undermines franchise renewal expectancies and could violate the Contracts Clause of the United States

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[44] *See* House Report at 105.

[45] In this regard, we believe that it is unnecessary to require cable operators to disclose to franchise authorities specific information regarding individual subscriber complaints as requested by NATOA. If a complaint to a cable operator cannot be resolved to a customer's satisfaction, a franchise authority is not precluded from considering individual cases brought to its attention, and may seek that information necessary to resolve such matters.

[46] 7 FCC Rcd at 8643, para. 7.

[47] *Id.*

[48] *See*, para. 7, *supra*.

[49] Section 632(a) of the Communications Act of 1934, as amended by the Cable Act of 1984, Public Law No. 98-549, 98 Stat 2780 (1984), provided in pertinent part:

> (a) A franchising authority may require, *as part of a franchise (including a franchise renewal)*, . . . provisions for enforcement of -
>
> (1) customer service requirements of the cable operator; and
>
> (2) construction schedules and other construction-related requirements of the cable operator.

(emphasis added). As amended by the Cable Act of 1992, Section 632(a) omits the language emphasized above.

[50] *See, e.g.*, NYSCCT comments at 6-7; Western comments at 13-14.

[51] These commenters suggest that with most cable franchises coming up for renewal within the next few years, there is no reason to impose new standards or disturb existing agreements immediately. *See, e.g.*, NCTA comments at 21, 27-28; Coalition comments at 7-8. Local governments, by and large, challenge this assertion, maintaining that such a position is unsupported by specific statutory language and is contrary to the clear findings of Congress that existing levels of service are inadequate and that cable consumers deserve immediate relief. *See* NATOA reply comments at 9; C-TEC Communities reply comments at 10.

Constitution.[52] They similarly argue that the Cable Act does not confer independent power on franchise authorities to adopt new enforcement mechanisms other than those already in place in existing franchise agreements.[53]

25. Commenting parties suggest that the Commission may wish to establish a transition or phase-in period to allow cable systems to make the necessary adjustments to achieve compliance with new customer service requirements. NATOA suggests that any phase-in should be determined for specific standards by a franchise authority on a waiver basis, based upon a showing of need by cable operators and until compliance can be achieved (but not to exceed one year).[54] The Cities of Miami Beach and St. Louis suggest that a three-month phase-in might be appropriate.[55] Consortium also supports the concept of a phase-in, but does not offer a specific time frame.[56] Comcast suggests that 12 months should be afforded to cable operators to comply with the Federal standards, with waivers available upon an appropriate showing (*e.g.*, when additional time is warranted for new personnel or equipment and a waiver is consistent with the interests of subscribers).[57] TCI and Time Warner suggest that the statutory language and legislative history of the Cable Act of 1992 are ambiguous regarding implementation, and that it would appear that new standards could be implemented only at a franchise grant, modification, transfer, or renewal. Nevertheless, they assert that they would have no objections to immediate implementation (upon franchise authority action) of the FCC-established customer service standards.[58]

26. *Discussion.* Our decision that local franchise authorities will enforce the self-executing Federal standards we adopt today raises the issue of when those standards should become effective. Virtually all commenters agree that the customer service requirements should be phased-in under a reasonable timetable; they disagree, however, about what the timetable should be. We note that a significant number of cable systems maintain that they have already successfully implemented service requirements modeled after the NCTA voluntary standards.[59] Although the standards adopted in this *Order* are more stringent than the NCTA voluntary guidelines, we find that the average cable system should be able to come into compliance with our standards within three months without significant industry disruption. Accordingly, the FCC standards will go into effect on July 1, 1993. However, before a local government begins enforcement of the FCC-established standards, we believe that it is appropriate to require the franchise authority to notify affected cable systems in writing of its enforcement plans.[60] This notification must be accomplished by certified mail, and must give affected cable operators 90 days notice of the intended enforcement.[61]

III. CUSTOMER SERVICE STANDARDS

A. Background

27. In the *Notice*, we sought comment on the specific customer service standards to be adopted in this proceeding. We noted that Congress suggested that the NCTA standards, which address each of the areas required by statute to be addressed in the Federal standards, could be used as a "benchmark" by the Commission in establishing such standards.[62] Accordingly, the *Notice* requested comment on whether the Commission should use the NCTA standards, or some modification thereof, as a benchmark

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[52] *See, e.g.*, NCTA comments at 27, n.3; CRB comments at 17, n.3. These parties maintain generally that the Contracts Clause (Article I, Section 10) of the Constitution prohibits any state "law impairing the obligations of contracts" and would thus prohibit a local government from unilaterally imposing new customer service requirements on a franchised cable operator. These commenters further argue that due to a franchise authority's asserted role as a contractor, as opposed to a regulator, imposition of new customer service requirements in mid-term requires the consent of the cable operator.

[53] In this regard, these commenters maintain that although the 1992 Act differs from the 1984 Act in the sense that the former does not contain language limiting the imposition of customer service standards to franchise renewals, the deletion of the "renewal language" does *not* mean that franchise authorities may amend *existing* franchise agreements to impose standards exceeding the federal standards. *See, e.g.*, Comcast comments at 5, n.5; Continental reply comments at 6 (removal of this language evidences Congress' intent to permit franchise authorities to adopt and impose only the Commission's customer service standards prior to renewal). The City of Kalamazoo ("Kalamazoo"), maintains that franchising authorities should remain free to implement additional customer service requirements pursuant to general State or municipal policing powers conferred in franchise agreements. Kalamazoo comments at 4-6.

[54] *NATOA* comments at 32. Various municipalities also recognize the need or desirability of a phase-in period, but generally endorse a shorter time-frame. *See, e.g.*, City of Miami Beach comments at 3 (no more than three months following the effective date of customer service requirements); St. Louis reply comments at 1 (120 days after the standards become effective).

[55] Miami Beach, Florida, comments at 3, n.6; St. Louis, reply comments at 4.

[56] Consortium comments at 6.

[57] Comcast comments at 4.

[58] TCI comments at 16-18; Time Warner comments at 10-11. However, TCI qualifies its position by stating that *if* the Federal standards adopted by the FCC track the NCTA guidelines, a six-month phase-in period (after notice to the cable operator) should be afforded. If the Commission varies from the NCTA standards, TCI urges that the time given to cable operators to implement such standards "should be significantly longer."

[59] *See, e.g.*, NCTA comments at 29; TCI comments at 2; Time Warner comments at 2; Comcast comments at 4, n.3.

[60] We do not believe that our decision today raises the Constitutional question regarding contracts suggested by some commenters. *See* note 52, *supra*. There is nothing in the record before us to indicate that the rules we adopt herein will result in a substantial impairment of contractual relationships between local governments and cable operators, or that those relationships in any event outweigh the significant and legitimate public purposes underlying both the statute and our implementing rules. *See, e.g., Energy Reserves Group v. Kansas Power and Light*, 459 U.S. 400, 410-13 (1983) (State law created no substantial impairment to the contractual relationship and any impairment was justified by significant and legitimate governmental interests).

[61] Franchise authorities may serve enforcement notifications before the FCC standards become effective, but they may not begin enforcing those standards until after they become effective *and* the cable operator has had the full 90 days' notice of the authority's intent to enforce them.

[62] *See* House Report at 105. However, the legislative history also discussed several perceived shortcomings with the NCTA

for setting the national standards or whether it should consider some other standards.[63] The NCTA standards were set out in the *Notice*,[64] and we asked a series of questions regarding each area covered by the standards and further requested parties to provide definitions for the meaning of the terms included in those standards. Finally, we also invited comment on other approaches we could take, such as a series of different standards depending on the characteristics of the cable system (*e.g.*, age, size or location of the system) or a range of service minimums.[65]

B. Federal Customer Service Standards

28. All of the commenters agree upon the need to develop standards that are clearly stated and flexible enough to account for the variety of needs, circumstances and economics of cable systems throughout the country.[66] While there is no consensus regarding the appropriate substance and scope of the customer service standards the Commission should adopt, the suggested standards generally fall into two categories. First, most cable operators and the two cable industry trade associations endorse the NCTA standards with some modification, usually proposing the inclusion of definitions for key terms.[67] Second, NATOA proposes a specific set of standards which are more stringent and specific than NCTA's and which address a greater number of issues.[68] Most local governments endorse the NATOA proposal.

29. The cable operators endorsing the NCTA standards argue that they offer a workable, national benchmark which can be tailored to meet local community needs and to account for the economics of particular cable systems.[69] TCI suggests that the lack of consensus as to the proper scope and content of the customer service standards is a persuasive reason for the Commission to adopt the "well-known and widely implemented NCTA standards."[70] According to NCTA, the cable industry has spent "tens of millions of dollars" to meet its standards. It further states the total number of cable systems which applied for certification for adopting the NCTA voluntary standards increased from 76 in 1990 to 1,985 in 1992.[71] These commenters argue that since the widespread implementation of the NCTA standards, customer service has improved and complaints have declined. Time Warner specifically notes that the legislative history's criticism of the industry's consumer service record reflects problems that existed before implementation of the NCTA standards.[72]

30. Most local governments, on the other hand, argue that while the NCTA standards may provide a useful starting point, they are neither stringent nor specific enough.[73] Many local governments cite the requirement in the NCTA standards that bills be "clear, concise and understandable" as a prime example of the vagueness of those standards.[74] They also argue that, by including language regarding customer service in the Cable Act of 1992, Congress clearly indicated that it wanted standards that are stricter than NCTA's.[75]

31. Consequently, the local governments propose adoption of different standards. While many submitted copies of their customer service regulations, they realize that these requirements are too specific for adoption as a Federal standard.[76] Thus, local governments instead generally endorse NATOA's recommended standards.[77] The NATOA proposal was derived from a variety of provisions of existing franchise agreements negotiated between cable operators and franchising authorities for both large and small cable systems.[78] It differs from the NCTA standards in three major respects: 1) the standards are more specific; 2) they are generally, although not always, more stringent, and 3) they cover several areas not addressed by the NCTA standards.[79] For instance, in addition to addressing the areas

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standards. *See Id.* at 34-37 (questions whether NCTA guidelines are stringent enough); Senate Report at 20-22 (notes concerns about the value of the NCTA standards).

[63] 7 FCC Rcd at 8643, para. 10.

[64] The NCTA standards, in their entirety, were printed in the Notice. *See* 7 FCC Rcd at 8644-45, para. 11-15.

[65] 7 FCC Rcd at 8645, para. 19.

[66] *See, e.g.*, CATA comments at 3; CRB comments at 2 (the NCTA standards, if applied with the intended flexibility, could provide a workable national benchmark); MFA comments at 16 (a single benchmark will best service the purpose of the Cable Act of 1992); NYSCCT comments at 9 (it is "virtually impossible to craft a set of standards which would service the needs of each and every community throughout the nation", but the NCTA standards are "reasonable minimal requirements"). *Cf.*, USSBA comments at 6 (believes that more than one federal service standard benchmark must be developed for customer service standards.)

[67] The NCTA standards do not contain any definitions for terms used in the standards, but NCTA, and some cable operators, propose definitions for key terms in their comments. *See* NCTA comments at 7.

[68] The NATOA proposed standards include provisions dealing with 18 different subject areas, including telephone and walk-in customer service requirements, handling and scheduling of service calls, damaged equipment, billing and billing disputes, franchisee employee identification and customer surveys and research. *See* NATOA reply comments, Attachment A.

[69] *See, e.g.*, CRB comments at 7; Comcast comments at 3.

[70] TCI comments at 1-2.

[71] NCTA comments at 7-8. For example, Time Warner states that its cable systems, which serve 6.9 million subscribers, and "many cable operators throughout the industry" have already implemented the NCTA standards "at significant cost, over the past two years." Time Warner comments at 2. CATA states that it believes the majority of its membership and NCTA's meet or exceed the NCTA standards. CATA comments at 2.

[72] Time Warner comments at 7.

[73] *See, e.g.*, Dallas comments at 5 (while NCTA standards are acceptable, they are incomplete and inflexible when applied to all local franchising authorities); Fairfax County reply comments at 11 (more stringent, as well as additional standards are needed to satisfy Congress' directive to establish effective minimum customer service requirements); Kalamazoo comments at 2; Metropolitan Area Communications Commission reply comments at 2-3; City of Vancouver and Clark County reply comments at 3.

[74] *See, e.g.*, Attorneys General comments at 9; NYSCCT comments at 9; St. Louis reply comments at 13.

[75] *See, e.g.*, Miami Beach comments at 4; C-TEC Communities reply comments at 11.

[76] *See, e.g.*, Attorneys General comments, Attachment A; City of Dallas comments, Exhibit A; NYSCCT comments, Attachment; City of Kalamazoo comments, Attachment.

[77] *See, e.g.*, reply comments of Anne Arundel County; Cape Coral; Cincinnati; Fort Lauderdale; Hillsborough County; Miami; New Orleans; Portland; Rainier Cable Commission; San Antonio; and Tallahassee.

[78] NATOA reply comments at 15.

[79] NATOA proposes over 40 standards, compared to NCTA

required by the statute in greater detail than the NCTA standards do. NATOA also recommends adoption of national standards governing notification to subscribers for routine service interruptions; damaged equipment; mechanisms regarding resolution of service-related disputes; voluntary and involuntary disconnections; distributions of promotional material; employee identification; and customer surveys and research.[80]

32. NCTA notes, however, that while endorsing the NATOA standards, the local governments do not address the costs such standards would impose on the cable operator. Furthermore, it argues, a rigid set of nationwide standards would not work for many systems and would, in fact, undermine the efficient delivery of cable service in many communities.[81] Time Warner agrees, arguing that the local governments "offer no persuasive rationale for believing that such standards would improve customer service" and that "imposing a new set of standards will simply increase costs without resulting in measurable increases in actual consumer satisfaction."[82] Comcast also notes that the customer service provisions must be interpreted in a manner that is consistent with the mandate of the Cable Act that rates be reasonable and that costs for additional services be reflected in a cable system's rate base.[83]

33. Continental Cablevision suggests an alternative approach to standards generally, proposing that the Commission adopt "performance standards" (standards which prescribe the results that are to be achieved and which measure the effects of a company's service on its customers) rather than content standards (standards which dictate what is to be done, such as the NCTA standards). Continental states that performance standards offer several advantages: they tend to be easier to implement, are more consumer oriented, and are cheaper to measure (and thus generally less costly). It believes that content standards, on the other hand, may actually reduce the quality of customer service because technical compliance with the standards can be achieved without achieving a beneficial impact on customers[84] . Further, Continental notes that the cost of implementing content standards as well as measuring compliance is higher and is money that could otherwise be spent improving customer service.[85]

34. *Discussion.* After carefully reviewing the record, we are adopting a single set of Federal customer service standards which deal with the specific areas set out in Section 632(b). As suggested by the legislative history of that section, we used the NCTA standards as a starting point for the development of our Federal standards. However, we have modified and added to those standards to take into consideration several of the problems with the NCTA standards raised by the commenters. Most notably, we have included definitions of key terms in the standards to help ensure a more uniform understanding of their requirements, and have strengthened other standards to ensure more satisfactory customer service.

35. We note that, although all commenters urge us to adopt flexible customer service standards, very few discussed our proposal to adopt permissible ranges for each specific standard.[86] Those commenters thatdid address this issue argued that the use of ranges would not be practical.[87] Accordingly, we will adopt a single set of Federal standards that will be applicable to all cable systems nationwide. We believe that these standards can be readily met by the vast majority of cable systems.

36. We stress, moreover, that we have built some flexibility into each standard in order to accommodate the different operating conditions faced by different cable systems.[88] Thus, for example, rather than defining "normal business hours" as a specific number of hours per week, we have developed a definition that relies on community standards to ascertain the appropriate number of hours a cable operator should be open for business.[89] Similarly, we will not require cable operators to meet all standards 100 percent of the time; rather, where appropriate, we have included a "safety net" in the compliance requirements to afford greater flexibility to cable operators. For instance, the 90 percent compliance requirement for telephone answer time will permit operators to fall short of the Federal standard, even under normal operating conditions, 10 percent of the time. We believe that these provisions will grant cable operators sufficient leeway to satisfy the Federal standards despite the different operating conditions they may face.

37. While we believe that many of the points made by Continental may be valid, we do not believe it is practical to adopt standards that are performance based. As noted by TCI, imposing a subjective rather than objective level of customer satisfaction would be very difficult to measure and would result in fluctuating standards and varying levels of customer satisfaction.[90] Accordingly, the Federal standards we adopt today will be content based.

1. Definitions

38. In the *Notice* we asked for comment on whether the Commission should provide definitions for key terms in the Federal standards, which terms needed definitions, and how those terms should be defined.[91] The NCTA standards

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which addresses 12. *See* NATOA proposed standards, NATOA reply comments, Attachment A; NCTA standards, 7 FCC Rcd 8644-45, paras. 11-15.

80 *See* NATOA reply comments at 29-30.

81 NCTA reply comments at 2.

82 Time Warner comments at 4-8 and reply comments at 2. *See also* TCI reply comments at 4 (tougher standards are not necessarily better standards).

83 Comcast comments at 2.

84 For example, Continental states that customer service representatives may spend less time with each customer so that more calls can be answered in order to reduce the busy rate. While the percentage of calls that result in a busy signal would thus be lowered, the goal of improved service may be undercut if customers get less of the customer service representatives' attention when they call, which could reduce their chance of getting their problem resolved. Continental comments at 11.

85 *Id.* at 8-15.

86 *See Notice*, 7 FCC Rcd at 8645, para. 19.

87 *See* Coalition comments at 7 (large burden on small systems to track various local standards); Fairfax County reply comments at 18 (inconsistent application of standards).

88 In addition, as discussed earlier, our rules allow for small cable systems, those with 1,000 or fewer subscribers, to apply to the Commission for a waiver if compliance with one or more of our rules is too onerous for that system. *See* para. 11 and note 18, *supra*.

89 *See* para. 43, *infra*.

90 TCI reply comments at 3-4.

91 7 FCC Rcd at 8645, para. 20.

do not define any terms. Almost all commenters, including NCTA, agree that to the extent the NCTA standards serve as a benchmark for Federal standards, certain terms need to be defined in order to be[clearly understood and uniformly applied. The most commonly cited terms were "normal business hours," "normal operating conditions" and "service interruptions." Since we will also be using these terms in the standards we adopt today, we agree that they should be specifically defined in order to prevent confusion.

a) *Normal Business Hours:* For purposes of the Commission's customer service standards, the term "normal business hours" means those hours during which most similar businesses in the community are open to serve customers. In all cases, "normal business hours" must include some evening hours at least one night per week and/or some weekend hours. Normal business hours are pertinent in regard to requirements for the telephone availability of trained company representatives, walk-up service and bill paying, installations and service calls, and repair of service interruptions.

39. Most cable operators and the cable industry trade associations propose that "normal business hours" be defined as general office hours, *i.e.*, 40 hours per week, Monday through Friday.[92] Under the NCTA standards, supplemental hours, either in the evening or on weekends, should be negotiated between the cable operator and the franchising authority. The local governments, in contrast, argue that cable is a service industry and thus cable operators should have hours beyond general office hours. They assert that in order to be convenient for subscribers who work during general office hours, cable operators must provide service more than 40 hours per week and that some evening and weekend hours must be included. NATOA's proposed standards would require a cable operator's office to be staffed to respond to the public not less than 50 hours per week, with at least 9 hours per weekday and 5 hours per Saturday.[93]

40. We agree with the local governments that cable is a service industry and thus it is not proper to limit public access to the cable operator's staff to 9-5, Monday through Friday. However, we also do not believe that it is reasonable to require the cable operator to staff its office for prescribed days or for prescribed hours beyond the normal work week. Our definition strikes a balance between these two interests by requiring the office to be open at least one evening or weekend day to accommodate people who work 9-5, Monday through Friday. Of course, the cable operator may agree to have its office open additional evening and weekend hours, as the needs of the community warrant. Additionally, the burden imposed by many of the standards may vary by the size of the system. For instance, the volume of telephone calls an operator receives, as well as installation and maintenance obligations, can be expected to vary in some direct relationship to the number of its subscribers. Further, the cable operator may use an agent such as a bank or other businesses to receive bill payments from cable customers during and outside of normal business hours. Such an arrangement, however, will not relieve the operator of its obligation to have its own bill payment locations open at least during normal business hours.

41. We believe that in most cases, service businesses in the community, including cable operators, will be open for business at least 40 hours a week. However, we also recognize that in some communities the normal work week may not be 40 hours or may vary with the time of year. Communities in different regions of the country keep business hours based on local factors such as population, demographics, income levels, peak demand periods, seasonal employment and fluctuations in retail activity. The definition accommodates these different situations by permitting cable systems to be open less than 40 hours per week if most similar businesses in the community also are open fewer than 40 hours a week.

b) *Normal Operating Conditions:* The term "normal operating conditions" includes those service conditions which are within the control of the cable operator. Those conditions which are *not* within the control of the cable operator include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe weather. Those conditions which *are* ordinarily within the control of the cable operator include, but are not limited to, special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods, and maintenance or upgrade of the cable system. The definition of normal operating conditions is relevant in assessing compliance with telephone answer time, installations, service calls, and repair of service interruptions.

42. Most commenters agree that it is not reasonable to expect a cable operator to meet customer service standards outside of normal operating conditions, such as during an earthquake, flood, or other natural disaster. The commenters disagree, however, on how the term "normal operating conditions" should be defined. The cable operators contend that such things as rate increases, enhancements or upgrades of the system, major changes in billing format, and exceptional pay-per-view offerings should be excluded from "normal operating conditions."[94] The local governments, on the other hand, argue that those types of situations are within the control of the cable operator and thus should be considered to be events that occur in the normal course of business. Further, they note that compliance requirements -- the NCTA standards must only be met 90 percent of the time -- can allow for some instances when cable operators cannot predict response to such things as pay-per-view events.[95]

43. We agree with the local governments that such things as special promotions, normal system maintenance and upgrades are within the control of the cable operator and

[92] *See, e.g.*, TCI comments at 10.

[93] *See* NATOA proposed standard 2, NATOA reply comments, Attachment A.

[94] Continental maintains that strict compliance with the standards should not be required for abnormal conditions that are within the "partial" control of the operator, *e.g.*, where the operator may be unable either to predict accurately the increased level of demand that may ensue, or to hire and train employees for just a few hours of short peak demand periods. Continental comments at 22.

[95] *See, e.g.*, C-TEC Communities reply comments at 9; St. Louis reply comments at 15-16.

should not, therefore, serve as an excuse for not complying with Federal customer service standards. Because these events are generally scheduled by the cable operator (*e.g.*, maintenance) or the operator knows the schedule reasonably well in advance of the event (*e.g.*, special promotions or pay-per-view events), we do not find it unreasonable to require the cable operator to adjust its staffing to maintain compliance with the customer service standards during those periods. As the local governments note, unusually high response to a pay-per-view event or other (unforeseen occurrences can be accounted for by the leeway provided in the compliance requirements in the Federal standards we establish herein, as described below. We note that the examples we list in the definition of "normal operating conditions" are not meant to be all-inclusive and may not cover other events within the operator's control.

c) *Service Interruption:* A "service interruption" means the loss of picture or sound on one or more channels. The definition of service interruption affects the timing of when the cable operator must respond to a service problem.

44. The cable interests commenting in this proceeding generally define a "service interruption" as a loss of picture on more than one channel.[96] In its proposed annotation of its standards, NCTA defines this term as "cable off in all television sets in the home."[97] The definition of this term is significant since, as described below, a cable operator will be required to respond more quickly to a "service interruption" than other service problems. The local governments argue that loss of sound and/or picture on even one channel should be defined as a "service interruption" which requires prompt attention.[98]

45. We find that the loss of picture or sound on one or more channels is a "service interruption." A subscriber is entitled to view and hear all of the channels presented over that system for which he or she pays. We do not believe it is reasonable to require a subscriber to lose the picture on more than one channel before the cable operator must take quick action to rectify a problem. We also believe that the sound portion of a channel is necessary for proper viewing and it is not unreasonable to require a cable operator to correct the loss of sound promptly.

2. Office Hours and Telephone Availability

A. The cable operator will maintain a local, toll-free or collect call telephone access line which will be available 24 hours a day, seven days a week.

1. Trained company representatives will be available to respond to telephone inquiries during normal business hours.

2. After normal business hours, the access line may be answered by a service or an automated response system, (including an answering machine. Inquiries received after normal business hours must be responded to by a trained company representative on the next business day.

B. Under normal operating conditions, telephone answer time by a customer representative, including wait time, shall not exceed 30 seconds from when the connection is made. If the call needs to be transferred, transfer time shall not exceed 30 seconds. These standards shall be met no less than ninety percent of the time, measured on a quarterly basis.

C. The operator will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards above unless an historical record of complaints indicates a clear failure to comply.

D. Under normal operating conditions, the caller will receive a busy signal less than three percent of the time.

E. Customer service center and bill payment locations will be open at least during normal business hours and will be conveniently located.

46. *Telephone availability.* The NCTA standards require that company representatives be available to respond to telephone inquiries Monday through Friday during normal business hours, *i.e.*, 9 am to 5 pm, and during supplemental hours on weekdays and/or weekends, based on community needs. In the *Notice* we noted that this standard does not reflect the fact that most television viewing occurs in the evening, which has made it difficult for customers to communicate with their local cable operator.[99] This problem was clearly recognized by the Congress. The legislative history included a discussion of two surveys conducted in the last several years, one by *Consumer Reports* and the other of cable subscribers in New York City. Both surveys indicated serious customer service problems in this area, finding that subscribers had considerable difficulty getting through to their cable operators, received busy signals more than half the time they called, and were placed on hold, in many cases, longer than one minute.[100]

47. Consequently, the local governments urge the Commission to go beyond the NCTA standard and require systems to offer extended telephone answering hours, up to 24 hours a day.[101] NATOA's proposed standards require that a cable operator maintain phone lines, either staffed or with answering capabilities, so that there is service 24 hours a day.[102] Most of the local governments state that the 24 hour availability can be met with an answering service, with a company representative responding to the emergency calls, such as service interruptions, as promptly as possible and routine calls by the next business day.[103]

48. Cable operators, on the other hand, express concern about the added cost that would be imposed to increase

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[96] *See, e.g.*, TCI comments at 13.
[97] NCTA comments at 14.
[98] *See* NATOA proposed standard 5(a), (b), NATOA reply comments, Attachment A.
[99] 7 FCC Rcd at 8644, para. 12.
[100] *See* House Report at 10; NATOA reply comments at 17. *See also*, C-TEC Communities reply comments at 5 (complaints of being on hold 20, 30 or 60 minutes.)
[101] *See, e.g.*, Miami Beach comments at 4; Attorneys General comments at 7; Fairfax County reply comments at 12; New Jersey Office of Cable Television ("NJOCT") reply comments at 7.
[102] NATOA proposed standard 1.(b), NATOA reply comments, Attachment A.
[103] *See, e.g.*, Attorneys General comments at 7 n.3; NYSCCT comments at 10.

telephone availability.[104] Continental warns that requiring extended telephone hours, where there is not a demonstrated need, is likely not to be cost justified. It alleges that systems would face considerable expense as a result of increased labor costs associated with overtime pay and differentials for night and weekend work.[105]

49. As many commenters observe, cable is clearly a 24 hour a day service. Most, if not all, cable networks operate on a 24 hour basis, as do many local television stations carried by cable systems. It is not unreasonable then to assume that subscribers may be watching cable programming 24 hours a day. It is also well documented that most television viewing is done in the evenings. Under these circumstances, we do not think it is unreasonable to require a cable operator to provide telephone availability 24 hours a day.

50. We are cognizant of the costs of keeping company representatives available on a 24 hour a day basis. In most instances, a caller's needs outside of normal business hours can be adequately met by leaving a message and having a company representative returning the call the next business day. Accordingly, we believe that allowing a cable operator to use an answering service, including an answering machine, for the hours outside "normal business hours" strikes a reasonable balance. Indeed, even the smallest system should be able to afford an answering machine to record subscriber calls for response when a company representative retrieves them. Additionally, our rules do not prohibit cable systems from using centralized telephone answering facilities or sharing facilities, as long as the cable operator meets the requirements set forth above.

51. *Telephone Answer Time.* The NCTA standards require telephone answer time, including wait time and the time to transfer the call, not to exceed 30 seconds. Many commenters state that this time could be increased.[106] NATOA's proposed standards, for example, provide for a separate period of up to 30 seconds to transfer a call.[107] Continental recommends that answer time exclude transfer time.[108]

52. We are concerned that including the time it takes a caller to explain what service is needed in the 30 second requirement such as that proposed by NCTA could cause company representatives to cut off callers or misdirect calls in order to meet the requirement. The Federal standard thus clarifies that the time a caller takes to describe his question or problem is not to be included in the time requirement. Rather, the Federal standard requires a call to be answered within 30 seconds, but allows a separate 30 second period in which to transfer the call after the company representative has ascertained the service desired by the caller.

53. *Telephone response measurements.* The NCTA standards require that the telephone answering requirement be met no less than 90 percent of the time on an annual basis. While no arguments were raised against the 90 percent compliance requirement, several local governments complain that measuring compliance on an annual basis can allow for major customer service problems to be statistically overlooked.[109] They recommend that compliance be measured on a monthly basis.[110] NATOA's proposed standards would require cable operators to file quarterly compliance reports.[111]

54. We believe that an annual compliance measurement is too long. As noted by several commenters, use of that time period would allow major lapses in customer service to be statistically lost and would not provide timely enough information to franchising authorities. On the other hand, we are concerned that a monthly measurement period would place undue administrative burdens on cable operators without commensurate benefit. We believe that the use of a quarterly compliance measurement period will provide the franchising authority with adequate and timely information on a cable operator's compliance with the standards without imposing an unnecessary burden on the cable operator.

55. *Measuring Telephone Performance.* Because it typically involves use of expensive equipment, measuring compliance with the telephone response standards clearly could impose a considerable expense on cable systems. The NCTA standards note that requiring systems with fewer than 10,000 subscribers to make systematic measurement of compliance would not be cost effective. Continental points out that measuring and documenting compliance could require many cable systems to purchase costly hardware, such as PBX equipment, which ranges from $50,000 to over $200,000, and/or computer hardware and software ranging from $13,000 to $60,000.[112] Cole, Raywid & Braverman note that the cable industry has invested significantly in the record keeping apparatus which measures compliance with the NCTA standards and to change those standards, even slightly, could impose significant capital equipment costs without a corresponding effect on customer service.[113]

56. We are cognizant of the significant costs of equipment required to measure compliance with the Federal standards. Accordingly, in order to prevent imposing an unreasonable economic burden on cable systems, our standards will not require the use of specific equipment to measure the answering and hold time parameters, unless a record of complaints emerges indicating a clear failure to comply. In all other instances, we require cable systems to use their best efforts to document, and, if necessary, to demonstrate compliance with the standard. Further, we advise cable operators to maintain sufficient records concerning all measurement requirements, so that compliance could be demonstrated if challenged.

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[104] *See, e.g.*, CATA comments at 9. *See generally* TCI comments at 5.

[105] Continental comments at 24.

[106] Northwest comments at 3; St. Louis reply comments at 8.

[107] NATOA proposed standards, 1.(c)(iii), NATOA reply comments, Attachment A.

[108] Continental comments at 25. *See also* NCTA comments at 11 (NCTA reports that 20% of customer's needs, such as accounting and billing inquiries, can be answered by an Automated Response Unit (ARU). Time spent working through an ARU menu would not count against response time).

[109] *See, e.g.*, Miami Beach comments at 4.

[110] *See, e.g.*, Miami Beach comments at 5; Northwest comments at 5.

[111] NATOA proposed standards, 1.(g), NATOA reply comments, Attachment A.

[112] Continental comments at 12 and 26. *See also* Viacom comments at 10-11; CRB comments at 7-8.

[113] CRB Comments at 9.

3. Installations, Outages, and Service Calls

Under normal operating conditions, each of the following four standards will be met no less than 95 percent of the time as measured on a quarterly basis:

A. Standard installations will be performed within seven business days after an order has been placed. "Standard" installations are those that are located up to 125 feet from the existing distribution system.

B. Excluding conditions beyond the control of the operator, the cable operator will begin working on "service interruptions" promptly and in no event later than 24 hours after the interruption becomes known. The cable operator must begin actions to correct other service problems the next business day after notification of the service problem.

C. The "appointment window" alternatives for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four hour time block during normal business hours. (The operator may schedule service calls and other installation activities outside of normal business hours for the express convenience of the customer.)

D. An operator may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.

E. If a cable operator representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the customer.

57. *Service Calls/Outages.* The NCTA standards require the cable operator to respond to service interruptions promptly, but no later than within 24 hours, and other service problems within 36 hours during the normal work week. NATOA argues that these time periods are too long, and recommends, instead, that a cable operator correct service interruptions within 12 hours. NATOA further recommends that all reception and other service problems be acknowledged within 24 hours, that all off premises repairs be completed within 24 hours and that repairs involving a visit to the subscriber's premises be completed in 48 hours.[114]

58. We believe that it is reasonable to require a cable operator to begin working on a service interruption promptly, but no later than 24 hours after it is notified that a problem exists. We use the phrase "working on" to clarify that a cable operator must do more than merely acknowledge the problem during that time frame, but rather must take positive steps toward rectifying the problem. We also find it reasonable to require the cable operator to begin actions to correct other service problems the next business day after being notified of the service problem. We decline to set time frames in which work must be completed, as NATOA suggests. The amount of time required to fix a service problem will vary greatly and we have no basis to establish a certain time for its completion. We are also concerned that establishing time periods to complete work may force a cable operator to take shortcuts to meet inflexible deadlines which could result in increased service problems in the future.

59. *Appointment Windows.* The NCTA standards provide that appointments be scheduled for "morning" or "afternoon" or "all day during normal business hours." Most commenters have no problem with the NCTA requirements that appointments be scheduled in the morning or afternoon, but the local governments argue that the "all day" option is too broad and vague.[115] The West Michigan Communities request that "first call of the day" or "call to meet" be included in our customer service standards.[116]

60. While it would be preferable to schedule appointments for a specific time, we realize that it is difficult at best for an installer or technician to estimate the time a service call will take until he or she is at the customer's premises. As a result, determining when the installer or technician will be able to meet with a subsequent customer can only be accomplished according to a general time frame. Consequently, we find that a four hour block for scheduling appointments with cable customers is reasonable. That block may be the same as "morning" or "afternoon," but need not be. It could, for example, be 10 am to 2 pm. We also agree with numerous commenters that an "all day" appointment window is too vague and unfair to consumers who must stay at home the entire day waiting for the installer or technician. While "first call of the day" or "call to meet" are good concepts, we do not believe they need be included in our standards. This does not, of course, preclude a cable operator from using them.

61. *Missed Appointments.* The NCTA standards state that an attempt will be made to contact the customer if the installer or technician is running late. The local governments argue that this standard is too vague and want a Federal standard to include a deadline past which appointments cannot be cancelled without penalty. The most often cited deadline is 24 hours in advance.[117]

62. We note that subscribers usually must adjust their schedules in order to meet an installer or technician at their home. This often requires the subscriber to take time off from work. While it is often difficult for the operator to know how long an individual service call will take, the operator has the flexibility to schedule service calls to ensure that technicians have adequate time to complete a project before the scheduled time of another service call. This is especially true where cable operators use a four hour time block to schedule appointments. Consequently, we believe it is reasonable to require a cable operator to cancel an appointment by the close of business on the business day prior to the scheduled appointment. This would allow the subscriber an opportunity to reschedule his or her day in light of the cancellation. Likewise, we conclude it is reasonable to require an installer or technician to contact the customer if the installer or technician is running late (*i.e.*, will not meet the specified appointment time) and to reschedule the appointment to a time conve-

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[114] NATOA reply comments at 23.
[115] MGB Associates comments at 3; Bayonne comments at 7.
[116] West Michigan Communities comments at 14-15.
[117] *See, e.g.*, Fairfax County reply comments at 13; Bayonne comments at 7.

nient for the subscriber. We stress that this latter contact is an independent obligation, and will not necessarily excuse a missed appointment.

63. *Credits/free installation.* The NCTA standards do not contain any requirement that subscribers be compensated for service interruptions or missed service appointments. The local governments support the use of some form of credits or free installation to penalize the cable operator for failure to comply with customer service standards.[118] NATOA recommends that if a cable operator has failed to correct a service problem within the requisite time period, thereby leaving the customer without service, the cable operator should be required to provide the subscriber a credit of free cable service.[119]

64. As we discussed in dealing with remedies for noncompliance with our customer service requirements, we do not believe it is necessary or appropriate for the Commission to establish refund or penalty guidelines.[120] As NATOA noted in its comments, many franchising authorities already provide for credits for failure to correct service problems within certain time periods,[121] and there is no indication that such practices require Federal intervention. Moreover, as noted above, local governments will be free to avail themselves of reasonable remedies to assure compliance with the customer service standards, which may involve ordering credits or refunds to the system's subscribers.[122] We also do not preempt in any way any existing penalty authority which a franchising authority may have through the franchise agreement or local or state law.

4. Communications, Bills, and Refunds

A. 1. The cable operator shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request:

a. products and services offered;

b. prices and options for programming services and conditions of subscription to programming and other services;

c. installation and service maintenance policies;

d. instructions on how to use the cable service;

e. channel positions of programming carried on the system; and,

f. billing and complaint procedures, including address and telephone number of the local franchising authority's cable office.

2. Customers will be notified of any changes in rates, programming services or channel positions as soon as possible through announcements on the cable system and in writing. Notice must be given to subscribers a minimum of 30 days in advance of such changes if the change is within the control of the cable operator. In addition, the cable operator shall notify subscribers 30 days in advance of any significant changes in the other information required by the preceding paragraph.

B. 1. Bills will be clear, concise and understandable. Bills must be fully itemized, with itemizations including, but not limited to, basic and premium service charges and equipment charges. Bills will also clearly delineate all activity during the billing period, including optional charges, rebates and credits.

2. In case of a billing dispute, the cable operator must respond to a written complaint from a subscriber within 30 days.

C. Refund checks will be issued promptly, but no later than either (i) the customer's next billing cycle following resolution of the request or 30 days whichever is earlier, or (ii) the return of the equipment supplied by the cable operator if service is terminated.

D. Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

65. *Bills.* The NCTA standards only require that bills be clear, concise and understandable. The local governments complain that this standard is too vague and note that they receive many complaints regarding billing, including "incomprehensible bill formats, inhospitable billing dispute resolution mechanisms, misrepresentation regarding the itemization of franchise fees and impositions of late charges without notice."[123] They recommend that the Federal standard require bills to be itemized to list each charge separately and to include the address and phone number for the franchising authority or the office designated to handle cable issues in the locality.[124] The cable operators oppose such a requirement. For example, Viacom urges the Commission to refrain from adopting a standard billing format or from prescribing particular information on the bill since cable operators are motivated by the market to improve their billing formats by the desire to receive prompt payment of subscriber bills and to avoid complaints.[125]

66. The legislative history of the Cable Act of 1992 manifests Congress' perception that billing is a significant problem for many cable customers. [126] Clearly, this is an area where Congress intended the Federal standards to require cable operators to improve current practices. Further, we do not believe that more than minimal incremental costs will accrue to cable operators to change their

[118] *See, e.g.,* MFA comments at 15; NJOCT comments at 7; Attorneys General comments at 9; NYSCCT comments at 11.

[119] NATOA recommends that a cable operator give a credit for 24 hours of free cable service for every service outage lasting for more than four hours in any 24 hour period, or 1/30 of the monthly bill. It also recommends that the cable operator give a credit for one free month's cable service for missing a scheduled appointment. NATOA reply comments at 24-25.

[120] *See* para. 21, *supra.*

[121] NATOA reply comments at 24.

[122] *See* para. 21, *supra.*

[123] NATOA reply comments at 28. *See also* Attorneys General comments at 9 ("Billing practices appear to be the single greatest source of complaints about a cable operator.")

[124] *See, e.g.,* Miami comments at 7, Montgomery County comments at 2-3; Fairfax County reply comments at 14.

[125] The Companies joint comments at 11.

[126] House Report at 34-36; Senate Report at 20-21.

bills to include the additional information and present it in a clear, concise fashion. Accordingly, we are adopting a Federal standard that describes the specific information that must be provided to subscribers.[127] This additional information should help eliminate many subscribers' inquiries to the franchising authority and the cable operator itself regarding billing.

67. *Refunds.* The NCTA standards require that refund checks must be issued within 45 days following the resolution of a request. The local governments contend that this is too long and propose reducing the period to 30 days.[128] We believe that a 30 day period is generally used in the business community and would be reasonable for cable operators as well. Likewise, we find it reasonable for the cable operator to include credits for service in the customer's next bill after resolution of the request for credit, such as for a missed service appointment or service interruption.

68. *Late Fees.* Many local governments complain that cable operators charge a flat late fee which can be equal to well over standard interest rates.[129] They suggest that a limit be placed on late fees. Options proposed range from specifying a certain percent charge to tying the charge to an index, *e.g.*, prime lending rate plus a fixed rate.[130] These types of issues are usually dealt with by state or local governments. Consequently, we decline to add this provision in the Federal standards, and instead, recommend that such concern be dealt with through local negotiation or application of local or state consumer protection and customer service laws.

C. Other Standards

69. While Section 632(b) permits the Commission to adopt customer service standards in areas not specified in the statute, we decline to do so at this time.[131] We believe, as we stated in the *Notice*, that the areas specified in the statute -- office hours and telephone availability; installations, outages and service calls; and communications, bills and refunds -- address the major areas of customer service based on levels of discontent found by Congress which can be handled on a national level.[132] If there are other areas of concern, such as employee identification, the statute and our rules allow the franchising authority to address those issues. The franchising authority, local or state government is thus free to craft additional requirements which best meet the unique needs of the particular community. Of course, we reserve the right to respond to particular circumstances brought to our attention to ensure that customer service satisfaction is achieved nationwide.

IV. ADMINISTRATIVE PROCEDURE ACT

70. Adelphia Communications Corporation ("Adelphia") challenges the Commission's proposed action in this proceeding as failing to comply with the notice provisions of the Administrative Procedure Act, 5 U.S.C. Sec. 551 *et seq.* ("APA"). It states that APA Section 553(b)(3) requires the Commission, when issuing a general notice of proposed rule making, to provide the public with either the terms or substance of a proposed rule or a description of the subjects and issues involved, and that the *Notice* fails to provide sufficient factual detail and rationale to permit interested parties to comment meaningfully. Specifically, it argues that the Commission has given inadequate notice of the customer service standards it intends to adopt, how such standards will be enforced, the interaction of the proposed Federal standards with State and local laws and existing cable franchise agreements, or any alternative approaches under consideration. Adelphia therefore concludes "that the Commission's ability to promulgate valid regulations on the basis of the [*Notice*] is limited."[133]

71. We disagree. The APA requires an agency to give advanced warning of proposed rule making by publishing a notice containing "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. Sec. 553(b)(3). The APA, however, "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." *California Citizens Band Association v. United States*, 375 F.2d 43, 48 (9th Cir. 1967); *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314 (4th Cir. 1980). Given the statutory constraints involved, we believe the *Notice* amply articulated the purposes intended to be served by the Commission's action, *see* paras. 1-4 (referencing Congressional findings and intent as well as this Commission's mandate with respect to customer service) and provided the public an adequate description of the subjects and issues involved, *see* paras. 4-7 (regarding the establishment, implementation and enforcement customer service standards), paras. 8-16 (specific potential standards), and paras. 17-20 (alternative approaches), including interpretations of statutory terms and tentative conclusions. We thus conclude that the *Notice* adequately set forth and elicited comment on proposals to implement Section 8 of the Cable Act of 1992. Indeed, extensive comments on these and other issues were in fact submitted. Accordingly, we reject Adelphia's arguments that the *Notice* did not comply with the requirements of the APA.

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[127] The customer service standard regarding subscriber notifications is in addition to other notification requirements that are imposed on cable operators by the rules we adopt to implement the 1992 Cable Act in such areas as rate regulation and broadcast signal carriage.

[128] *See, e.g.*, Miami comments at 7, Attorneys General comments at 11; Dallas comments at 6; St. Louis reply comments at 14.

[129] *See* Dade County reply comments at 7.

[130] *See* Northwest comments at 3.

[131] USSBA agrees that the FCC should not decide additional customer service issues in this Report and Order but suggests that the FCC may wish to launch a Notice of Inquiry on other customer service issues. USSBA comments at p.3, n.3. In light of our conclusions herein, we believe that the provisions addressed in the statute should provide an adequate framework for the Federal standards we are establishing here. Consequently, we do not feel it is necessary to initiate a Notice of Inquiry at this point. The Cable Act of 1992 provides ample authority to undertake additional rule making in the future, if experience with the instant standards and procedures proves them unsatisfactory.

[132] 7 FCC Rcd at 8642, note 13.

[133] Adelphia comments at 2.

V. ADMINISTRATIVE MATTERS

Final Regulatory Flexibility Analysis

72. Pursuant to the Federal Flexibility Act of 1980, the Commission's final analysis is as follows:

I. *Need and purpose of this action:* The Commission's goal is to implement Section 8 of the Cable Act of 1992, which concerns customer service standards to be applied to cable operators nationwide.

II. *Issues raised in response to the Initial Regulatory Flexibility Analysis:* The Chief Counsel for Advocacy of the United States Small Business Administration ("USSBA") took no position on adoption and enforcement issues raised in the *Notice*. It did, however, urge the Commission to limit the standards to be developed to those specifically enumerated in the statute, and suggested that a later Notice of Inquiry could be launched if it appears that further standards might be appropriate. USSBA also stated that the Commission should establish more than one Federal customer service benchmark. Specifically, it advocated tiering customer service standards based on the size and type of system, then further subdivide categories based on the age of the cable system, and then further classify systems based on the number of subscribers. Once separate tiers have been established, USSBA would not select specific customer service targets, but rather a range of standards from which cable operators and franchising authorities could agree. Although it acknowledges that this type of stratification may be complex, USSBA states that it will work to ensure that comparable type systems meet comparable customer service standards.

III. *Significant alternatives considered:* USSBA's and other commenting parties' comments concerning small business concerns and alternatives were fully considered in this proceeding. We agreed with USSBA regarding the establishment of customer service standards specifically enumerated in the statute. However, this *Report & Order* does not accept USSBA's specific arguments concerning the establishment of multiple national standards based on classifications of cable systems. The Commission did, however, consider various alternatives, including USSBA's, in responding to the concerns regarding the impact of these matters on small cable systems. *See* discussion at paragraphs 11-12, *supra*.

VI. ORDERING CLAUSES

73. Accordingly, IT IS ORDERED that, pursuant to authority contained in and Sections 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Part 76 of the Commission's Rules, 47 C.F.R. Part 76, IS HEREBY AMENDED as shown in Appendix B.

74. IT IS FURTHER ORDERED THAT the rule changes made herein will become effective July 1, 1993.

75. For further information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792 or David Krech, Office of Legislative Affairs, (202) 632-6405.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS

Adelphia Communications Corporation

The Attorneys General of Pennsylvania, Massachusetts, New York, Ohio and Texas

Coalition of Small System Operators

Cole, Raywid & Braverman

Comcast Corporation, Cox Communications, Inc., and Jones Intercable, Inc.

The Community Antenna Television Association, Inc.

The State of Connecticut, Department of Public Utility Control

Consortium of Small Cable System Operators

Continental Cablevision, Inc.

The City of Dallas, Texas

The City of Kalamazoo, Michigan

The Metropolitan Area Communications Commission

Metropolitan Dade County, Florida

MGB Associates, Inc.

The City of Miami Beach, Florida

Montgomery County, Maryland

Municipal Franchising Authorities

National Association Of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties

National Cable Television Association, Inc.

National Telephone Cooperative Association

New York State Commission on Cable Television

The Northwest Municipal Cable Council

Tele-Communications, Inc.

Time Warner Entertainment Company, L.P.

The Chief Counsel for Advocacy of the United States Small Business Administration

Viacom International, Inc., Providence Journal Company, Multivision Cable TV Corp. and Cablevision Industries, Inc.

West Michigan Communities

LATE-FILED OR INFORMAL COMMENTS

The City of Bayonne, New Jersey

Fairfax County, Virginia

The Minnesota Association of Cable Television Administrators

REPLY COMMENTS

Anne Arundel County, Maryland

The City of Cape Coral, Florida

The City of Cincinnati, Ohio

Coalition of Small System Operators

The Community Antenna Television Association, Inc.

Continental Cablevision, Inc.

C-TEC Communities

Five Rural Telephone/Cable Companies

The City of Fort Lauderdale, Florida

GTE Service Corporation

Hillsborough County, Florida

The Intercommunity Cable Regulatory Commission

The City of Kalamazoo, Michigan

The Metropolitan Area Communications Commission

The City of Miami, Florida

National Association Of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties

National Cable Television Association, Inc.

The State of New Jersey, Office of Cable Television

The City of New Orleans, Louisiana

The City of Portland, Oregon

The Rainier Cable Commission

The City of St. Louis, Missouri

The City of San Antonio, Texas

The City of Tallahassee, Florida

Tele-Communications, Inc.

Time Warner Entertainment Company, L.P.

The City of Vancouver and Clark County, Washington

Viacom International, Inc., Providence Journal Company, Multivision Cable TV Corp. and Cablevision Industries, Inc.

APPENDIX B

Title 47 CFR, Part 76 (Cable Television Service), Subpart H (General Operating Requirements) is amended as follows:

1. The authority citation for Part 76 is revised to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309; Secs. 612, 614-615, 623, 632 as amended, 106 Stat. 1460; 47 U.S.C. Secs. 532, 533, 535, 543, 552.

2. Section 76.309 will be added to the Commission's Rules and will read as follows:

Section 76.309 Customer Service Obligations

(a) A cable franchise authority may enforce the customer service standards set forth in paragraph (c) of this section against cable operators. The franchise authority must provide affected cable operators ninety (90) days written notice of its intent to enforce the standards.

(b) Nothing in this rule should be construed to prevent or prohibit:

(1) a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards set forth in paragraph (c) of this section;

(2) a franchising authority from enforcing, through the end of the franchise term, pre-existing customer service requirements that exceed the standards set forth in paragraph (c) of this section and are contained in current franchise agreements;

(3) any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted herein; or

(4) the establishment or enforcement of any State or municipal law or regulation concerning customer service that imposes customer service requirements that exceed, or address matters not addressed by, the standards set forth in paragraph (c) of this section.

(c) Effective July 1, 1993, a cable operator shall be subject to the following customer service standards:

(1) Cable system office hours and telephone availability-

(i) The cable operator will maintain a local, toll-free or collect call telephone access line which will be available to its subscribers 24 hours a day, seven days a week.

(A) Trained company representatives will be available to respond to customer telephone inquiries during normal business hours.

(B) After normal business hours, the access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after normal business hours must be responded to by a trained company representative on the next business day.

(ii) Under normal operating conditions, telephone answer time by a customer representative, including wait time, shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety (90) percent of the time under normal operating conditions, measured on a quarterly basis.

(iii) The operator will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards above unless an historical record of complaints indicates a clear failure to comply.

(iv) Under normal operating conditions, the customer will receive a busy signal less than three (3) percent of the time.

(v) Customer service center and bill payment locations will be open at least during normal business hours and will be conveniently located.

(2) Installations, outages and service calls- Under normal operating conditions, each of the following four standards will be met no less than ninety five (95) percent of the time measured on a quarterly basis:

(i) Standard installations will be performed within seven (7) business days after an order has been placed. "Standard" installations are those that are located up to 125 feet from the existing distribution system.

(ii) Excluding conditions beyond the control of the operator, the cable operator will begin working on "service interruptions" promptly and in no event later than 24 hours after the interruption becomes known. The cable operator must begin actions to correct other service problems the next business day after notification of the service problem.

(iii) The "appointment window" alternatives for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four-hour time block during normal business hours. (The operator may schedule service calls and other installation activities outside of normal business hours for the express convenience of the customer.)

(iv) An operator may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.

(v) If a cable operator representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the customer.

(3) Communications between cable operators and cable subscribers-

(i) Notifications to subscribers-

(A) The cable operator shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request:

(1) Products and services offered;

(2) Prices and options for programming services and conditions of subscription to programming and other services;

(3) Installation and service maintenance policies;

(4) Instructions on how to use the cable service;

(5) Channel positions of programming carried on the system; and,

(6) Billing and complaint procedures, including the address and telephone number of the local franchise authority's cable office.

(B) Customers will be notified of any changes in rates, programming services or channel positions as soon as possible through announcements on the cable system and in writing. Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator. In addition, the cable operator shall notify subscribers thirty (30) days in advance of any significant changes in the other information required by the preceding paragraph.

(ii) Billing-

(A) Bills will be clear, concise and understandable. Bills must be fully itemized, with itemizations including, but not limited to, basic and premium service charges and equipment charges. Bills will also clearly delineate all activity during the billing period, including optional charges, rebates and credits.

(B) In case of a billing dispute, the cable operator must respond to a written complaint from a subscriber within thirty (30) days.

(iii) Refunds- Refund checks will be issued promptly, but no later than either-

(A) The customer's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or

(B) The return of the equipment supplied by the cable operator if service is terminated.

(iv) Credits- Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

(4) Definitions-

(i) Normal Business Hours- The term "normal business hours" means those hours during which most similar businesses in the community are open to serve customers. In all cases, "normal business hours" must include some evening hours at least one night per week and/or some weekend hours.

(ii) Normal Operating Conditions- The term "normal operating conditions" means those service conditions which are within the control of the cable operator. Those conditions which are *not* within the control of the cable operator include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions. Those conditions which *are* ordinarily within the control of the cable operator include, but are not limited to, special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods, and maintenance or upgrade of the cable system.

(iii) Service Interruption- The term "service interruption" means the loss of picture or sound on one or more cable channels.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-1

In the Matter of

Amendment of Parts 2 and 15 to
Prohibit Marketing of Radio Scanners
Capable of Intercepting Cellular
Telephone Conversations

REPORT AND ORDER

Adopted: April 19, 1993; Released: April 22, 1993

By the Commission:

INTRODUCTION

1. By this action, the Commission amends Parts 2 and 15 of its rules to prohibit the manufacture and importation of radio scanners capable of receiving frequencies allocated to the Domestic Public Cellular Radio Telecommunications Service.[1] This action implements statutory requirements set forth in the Telephone Disclosure and Dispute Resolution Act (TDDRA), Pub. L. 102-556. The rules being adopted are intended to increase the privacy protection of cellular telephone users without unduly restricting legitimate uses of scanners.

BACKGROUND

2. The Domestic Public Cellular Radio Telecommunications Service ("Cellular Radio Service") provides telephone service to mobile customers. Cellular telephones use frequencies in the bands 824-849 MHz and 869-894 MHz to connect their users to other cellular system users and to the Public Switched Telephone Network.

3. As defined within our rules, scanning receivers, or "scanners," are radio receivers that can automatically switch between four or more frequencies anywhere within the 30-960 MHz band.[2] In order to control their potential to cause harmful interference to authorized radio communications, the rules require that scanners receive an equipment authorization (certification) from the Commission prior to marketing.[3] The Electronic Communications Privacy Act of 1986, Pub. L. 99-508, in part, made it illegal to intentionally intercept cellular communications or to manufacture equipment primarily useful for the surreptitious interception of cellular communications.[4] However, the Commission was not given specific authority to deny equipment authorization to scanners that receive cellular frequencies. As a result, we have routinely authorized scanners capable of receiving cellular frequencies.[5]

4. On October 28, 1992, the President signed the TDDRA into law. Section 403 of the TDDRA amends Section 302 of the Communications Act of 1934 (47 U.S.C. Section 302(d)(1) and (2)) by requiring that by April 26, 1993 (180 days after enactment of the TDDRA), the Commission prescribe and make effective regulations denying equipment authorization for any scanning receiver that is capable of:

- receiving transmissions in the frequencies allocated to the domestic cellular radio service,
- readily being altered by the user to receive transmissions in such frequencies, or
- being equipped with decoders that convert digital cellular transmissions to analog voice audio.

Further, Section 302(d)(2), as amended by the TDDRA, provides that, beginning one year after the effective date of the regulations adopted pursuant to paragraph (d)(1), no receiver having such capabilities shall be manufactured in the United States or imported for use in the United States.[6]

5. In accordance with the TDDRA, we adopted a *Notice of Proposed Rule Making* (*Notice*) proposing to deny equipment authorization to scanning receivers that: 1) tune frequencies used by cellular telephones; 2) can be readily altered by the user to tune such frequencies; or, 3) can be equipped with decoders that convert digital cellular transmissions to analog voice audio.[7] The *Notice* requested comment on a proposed definition of "readily altered by the user." The *Notice* also proposed to deny equipment authorization (notification) to frequency converters that tune, or can be readily altered by the user to tune, cellular telephone frequencies.[8] To assist us in determining compliance with these requirements, we proposed to require applicants for certification of scanners, and for notification of frequency converters used with scanners, to include in

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[1] The Commission's regulations regarding the Domestic Public Cellular Radio Telecommunications Service are set forth in Part 22 of the FCC rules, 47 CFR Part 22, Subpart K.

[2] *See* 47 CFR Section 15.3(v).

[3] *See* 47 CFR Sections 15.101(a) and 2.1031 *et seq.*

[4] *See* 18 U.S.C. Sec. 2511, 2512.

[5] In the past five years, 22 different models of scanning receivers capable of receiving cellular telephone transmissions have been issued grants of equipment authorization. During this same period, ten other models capable of tuning frequencies between 806 and 900 MHz *except* for the cellular bands have also been authorized. Several publications currently on the market describe relatively simple modifications that users can make to many of the latter scanning receivers to enable that equipment to receive cellular telephone transmissions.

[6] *See* Telephone Disclosure and Dispute Resolution Act, *supra*, Section 403. Section 403 also requires that the Commission report to Congress, by June 1, 1993, on available security features for both analog and digital cellular radio signals. This reporting requirement will be dealt with separately from this proceeding.

[7] *See Notice of Proposed Rule Making* in ET Docket No. 93-1, adopted January 4, 1993, 8 FCC Rcd 359 (1993).

[8] There are a number of frequency converters on the market that convert cellular radio transmissions in the 800 MHz band to lower frequencies. These devices can be easily used in conjunction with scanners that receive frequencies below 800 MHz to enable the reception of cellular telephone transmissions. These converters are receivers subject to authorization under the notification procedure. *See* 47 CFR Section 15.101.

their applications a statement stating that the device cannot be easily altered to enable a scanner to receive cellular transmissions.

6. Some 46 parties filed comments on the *Notice* and 6 parties filed reply comments.[9] A large number of commenters, presumably most of them scanner enthusiasts, oppose adoption of any rules that would restrict the tuning capabilities of scanners.[10] Manufacturers of scanners and cellular service providers in general support the Commission's proposed changes. However, several commenters ask for clarification or expansion of the rules. Issues raised in the comments are discussed below.

DISCUSSION

7. In accordance with the TDDRA, we are adopting new rules restricting scanners and associated frequency converters generally as proposed in the *Notice*. Based on the comments, we are adopting several minor changes to the rules as proposed.

8. *Scanning receivers:* Although many commenters request that we decline to enact rules denying equipment authorization to scanning receivers capable of receiving cellular telephone transmissions, enactment of such rules is required by the TDDRA. Several commenters request that we also prohibit scanners from being able to receive signals from other similar radio services, such as the Personal Communications Service and the Specialized Mobile Radio Service.[11] Such action goes beyond the requirements of the TDDRA and, as such, is beyond the scope of this proceeding. Accordingly we are amending our rules to provide that scanning receivers must be incapable of operating (tuning) within the frequency bands allocated to the Domestic Public Cellular Radio Telecommunications Service.

9. *Frequency converters:* As discussed above, we also proposed to deny equipment authorization to frequency converters used with scanning receivers that can tune, or be readily altered by the user to tune, cellular telephone frequencies. A number of commenters suggest that the TDDRA does not give us authority to ban frequency converters that can be used with scanners to monitor cellular telephone transmissions.[12] Grove Enterprises and others indicate that restricting frequency converters from being able to tune cellular frequencies would require significant design changes and could cause financial hardship to companies that manufacture and market frequency converters. Uniden America Corporation ("Uniden"), a scanner manufacturer, argues that frequency converters, which are currently subject to the equipment authorization procedure of notification, should be subject to certification, just like scanning receivers.

10. While the TDDRA does not specifically address frequency converters it does prohibit the authorization of scanning receivers that are capable of being readily altered by the user to receive cellular transmissions. Frequency converters that tune cellular frequencies can be easily and readily used, with virtually any existing scanner, to intercept cellular communications. Rather than prohibit all scanners because of the availability of frequency converters, we believe it is more prudent to restrict the tuning capability of these converters.[13]

11. We recognize that frequency converter designs are typically not very sophisticated compared to those of scanning receivers, and that banning frequency converters capable of converting cellular transmissions will significantly increase the design complexity necessary for converters to comply with our technical standards. We further recognize, as several commenters note, that there are very legitimate uses for converters that convert 800 MHz and 900 MHz signals down to lower frequencies.[14] Even though the restrictions we proposed for converters will undoubtedly make it more difficult and expensive to purchase 800 MHz and 900 MHz converters for legitimate purposes, we believe the intent of the TDDRA leaves us no choice but to adopt them.[15]

12. Regarding Uniden's suggestion to require certification of frequency converters, we do not believe that adding this additional burden is necessary. Scanners are subject to a more comprehensive application process than frequency converters because we have determined that scanners are more likely to cause interference to authorized radio communications than converters. We believe we can properly enforce the ban on reception of cellular frequencies by converters if they remain under the notification procedure, and thus we see no need for converters to be certified.

13. *Definition of "readily altered by the user":* In the *Notice*, we proposed to require that scanning receivers and frequency converters capable of being "readily altered by the user" include, but not be limited to, those for which the ability to receive transmissions in the cellular bands

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[9] Appendix A contains a list of the commenting parties.

[10] These included James Arconati, Frank Carson, Cellular Services Group, Inc., Michael Costello, Gregory Doerschler, George DuBois, Electronic Equipment Bank, Brian Fish, Steven Garrison, Jerome Jancuk, John Langner, Late Night Software, Jack Mor, Brian Morgan, Ray Murray, Jiro Nakamura, Alex Griffiths, Craig Paul, PrivaFone, George Raetz, Lawr Salo, Steven Sergeant, Eric Snyder, David Truran, William Wells, Duane Whittingham, Charles Wilkinson, Mike Youngberg and Roy Zimmer.

[11] Southwestern Bell Mobile Systems and GTE Service Corporation request inclusion of PCS frequencies, and Fleet Call requests inclusion of SMR frequencies.

[12] These include James Cassel, George DuBois, Grove Enterprises, Inc., Thomas Hartoin, Brian Roberts, Philip Snider, Bernhard Ulfers and William Wells.

[13] None of the comments in this proceeding have indicated to us that there is a method of preventing scanner-converter combinations from receiving cellular transmissions that would be less disruptive to scanner manufacturers, retailers or users.

[14] While the new rules are targeted only towards the cellular frequencies in the 800 MHz band, the American Radio Relay League ("ARRL") expresses concern that they will have an impact on converters used by amateur radio operators for reception of signals in the 902-928 MHz amateur band. ARRL requests that we modify our proposed rules to specifically state that converters designed for reception of the 902-928 MHz frequencies by amateur radio operators are in compliance with our rules. We do not agree such a modification is appropriate because it would not adequately ensure that such converters would not be readily available and commonly used to intercept cellular communications.

[15] Based on several comments, we are modifying the rule slightly from that proposed to indicate that it applies to frequency converters "designed or marketed for use with scanning receivers" rather than to frequency converters "used with scanning receivers," as proposed. We do not believe it appropriate to restrict cable television converters or other devices that might be able to receive cellular telephone transmissions but were not designed for that purpose.

can be added by clipping the leads of, or installing, a simple component such as a diode, resistor and/or jumper wire; or by replacing a plug-in semiconductor chip. There is general support for the proposed definition. The Cellular Telecommunications Industry Association ("CTIA") requests that we, in addition, require that: 1) microprocessors be used to control the tuning circuitry of all scanners and frequency converters; and, 2) blocking out of cellular frequencies be done internal to these microprocessors. Uniden and the Consumer Electronics Group of the Electronic Industries Association ("EIA/CEG") argue that manufacturers should be granted a reasonable amount of discretion in their receiver designs as long as they are consistent with the statutory objective. Furthermore, Frank Carson and Jeffrey Krauss suggest that requiring significant changes to scanners, such as modifying the microprocessor in order to block out cellular frequencies, could add significantly to the cost of scanners without providing a significant protection against the interception of cellular telephone calls. Finally, BellSouth Corporation, et al. ("BellSouth")requests that our definition of devices that can be "readily altered by the user" include scanners and converters that can be programmed to receive cellular transmissions by entry of an access code or by reprogramming a memory module.

14. After reviewing the comments, we conclude that our proposal will adequately prohibit the use of scanner and frequency converter designs that can be easily altered by the user to receive cellular frequencies. However, to add clarity to the rules, we are adopting BellSouth's suggested changes.[16] We are rejecting the changes proposed by CTIA, because they would severely and unnecessarily restrict the ability of scanning receiver manufacturers to produce new and innovative product designs and to respond in a cost-effective manner to the requirements of the TDDRA. As proposed, we are also requiring that scanners be incapable of converting digital cellular transmissions to voice audio.

15. *Documentation:* In the *Notice*, we proposed to require applicants for equipment authorization of scanners and frequency converters to include in their applications a statement that their devices cannot be readily altered to receive cellular telephone transmissions. We also solicited comments on whether additional information, such as why the device cannot be readily altered, should be required. Vanguard Cellular Systems, Incorporated ("Vanguard") and Southwestern Bell Mobile Systems, Incorporated ("Southwestern Bell"), both cellular service providers, and CTIA ask that applicants be required to submit detailed explanations of why their devices cannot be easily modified to receive cellular frequencies. Uniden, a scanner manufacturer, objects to such a requirement, adding that the current FCC rules (47 CFR Section 2.939) dictate the circumstances under which an equipment authorization might be revoked and provide sufficient incentive for the grantee to ensure compliance.

16. It is very important that we review the designs of scanner and frequency converter equipment before granting equipment authorizations because, should we authorize a model that is later found to be easily modified, it would be very difficult and costly for the grantee to recall the units that had already been sold. Consequently, we will require that information be provided by applicants for scanning receiver certification and frequency converter notification describing why their devices cannot be easily modified. We note that we currently require a similar statement with regard to security coding features on cordless telephones,[17] and that requirement seems to have been effective in that case.

17. *Transition provisions:* We proposed to deny equipment authorization to all scanners and converters whose applications for equipment authorization do not comply with the rules adopted herein and are filed on or after April 26, 1993. We also proposed to ban the manufacture and importation, effective April 26, 1994, of all scanners and converters that do not comply with the rules adopted herein including ones that we have granted equipment authorizations to. The proposed rules would allow existing authorized scanners and frequency converters that can receive cellular frequencies to be sold and used indefinitely, provided they are manufactured and imported prior to April 26, 1994. BellSouth recommends that we deny authorization to all scanners and converters that have applications *pending* on April 26, 1993. EIA/CEG objects to this proposal, stating that it is inappropriate for us to deny an equipment authorization to a product that complies with the rules in effect at the time its application is submitted. Since the TDDRA requires us to "*make effective* regulations denying equipment authorization" to affected scanners and converters by April 26, 1993,[18] [emphasis added] we are modifying our rules in accordance with BellSouth's recommendation.

18. BellSouth further requests that, on April 26, 1994, we revoke the grants of equipment authorization for all scanning receivers and converters that do not comply with the technical standards ultimately adopted in this proceeding, thus prohibiting the sale of all such devices after April 26, 1994. This would place a significant hardship on all manufacturers, retailers and users that might wish to sell existing scanners and converters, and would be extremely difficult to enforce. Furthermore, as EIA/CEG points out, such action would go beyond what is required by the TDDRA. Accordingly, we are denying this aspect of BellSouth's request.[19]

19. *Cellular scanners for legitimate users:* Harris Corporation ("Harris"), GTE Service Corporation ("GTE"), Electronic Equipment Bank ("EEB"), NYNEX Mobile Communications Company ("NYNEX"), McCaw Cellular Communications, Incorporated ("McCaw"), CTIA and Uniden request that we clarify our rules to specifically exempt scanners and converters that are marketed exclusively to law enforcement agencies and cellular system operators

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[16] This prohibition on reprogrammable scanners applies to units that can have cellular coverage restored by reprogramming a memory chip from either the scanner's keyboard or an external device, such as a personal computer.

[17] *See* 47 CFR Section 15.214.

[18] *See* Telephone Disclosure and Dispute Resolution Act, *supra*, Section 403.

[19] Electronic Equipment Bank questions whether it will be permissible to sell used scanners capable of receiving cellular frequencies. The answer is "yes," as long as the scanners are FCC-certified and were manufactured and/or imported prior to April 26, 1994. Equipment sellers, especially those trading in used equipment, should note, however, that FCC-certified scanners that have been modified (such as by clipping a diode to enable reception of cellular frequencies) are no longer FCC-certified and may not be legally marketed.

from the technical standards adopted in this proceeding. Such an exemption is provided for by Section 403(c) of the TDDRA.[20] We agree with these commenters that an exemption is needed for devices intended to be marketed to law enforcement agencies and cellular system operators and are modifying the proposed Section 15.121, accordingly.[21]

20. *Enforcement of new rules:* Tandy Corporation ("Tandy") and EIA/CEG express concern about our intended methods of enforcing the rules adopted in this proceeding. Tandy, which sells scanners through Radio Shack, Computer City and other affiliated stores, requests that we not hold retailers strictly liable for marketing scanners that can be readily altered by the user to receive cellular frequencies, provided such scanners have been FCC-certified.

21. Generally, we will not hold retailers responsible for marketing scanners that were certified and are subsequently found to be readily alterable. However, we may require that retailers cease marketing such products, and a violation of such a requirement would be grounds for enforcement action. Furthermore, any retailer marketing a scanner that also performs alterations to that scanner so customers can receive cellular frequencies will be violating FCC rules and the Communications Act, and therefore will be subject to appropriate enforcement sanctions.

PROCEDURAL MATTERS

22. *Final Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, our final analysis is as follows:

I. Need for and purpose of this action: This action is required by the Telephone Disclosure and Dispute Resolution Act (Pub L. 102-556).

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis: Jeffrey Krauss argues that the rules proposed in the *Notice* could affect far more small entities than the 50 or fewer manufacturers we have suggested. Mr. Krauss says users of scanning receivers, including thousands of small businesses and tens of thousands of individual citizens, could be affected because the new rules will require manufacturers to redesign their products and these manufacturers will likely pass the redesign cost along to end users.

III. Significant alternatives considered and rejected: While it is possible that the rules being adopted in this proceeding may raise the cost to consumers of certain types of scanners, this action is required by law, and we have found no less burdensome method of complying with the TDDRA.

EFFECTIVE DATE

23. The TDDRA requires that the rules adopted in this proceeding become effective on or before April 26, 1993. Accordingly, due to the limited time available to meet this requirement, we find good cause for the rules adopted herein to become effective upon publication in the *Federal Register*. *See* 5 U.S.C. Section 553(d).

ORDERING CLAUSES

24. Accordingly, IT IS ORDERED THAT under the authority contained in Sections 4(i), 302 and 303 of the Communications Act of 1934, as amended, and the Telephone Disclosure and Dispute Resolution Act, Parts 15 and 2 of our Rules and Regulations ARE AMENDED as set forth in Appendix B below. These rules and regulations are effective upon publication in the *Federal Register*. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

25. For further information on this proceeding, contact David Wilson, Technical Standards Branch, Office of Engineering and Technology, at 202-653-8138.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties filing comments in this proceeding:

American Radio Relay League, Inc.
Arconati, James E.
BellSouth Corporation
Carson, Frank
Cassel, James E.
Cellular Services Group
Cellular Telecommunications Industry Association
Costello, Michael
Doerschler, Gregory K.
Dubois, George
Electronic Equipment Bank
Fish, Brian
Fleet Call, Inc.
Garrison, Steven
Grove Enterprises
GTE Service Corporation

[20] Section 403(c) of the TDDRA provides that "This section shall not affect section 2512(2) of title 18, United States Code." *See* Telephone Disclosure and Dispute Resolution Act, *supra*, Section 403(c).

[21] EEB, GTE and Harris question the effect of this proceeding on very expensive scanning receivers that are not likely to be purchased by the general public. The rules being adopted here apply to all scanners, regardless of cost.

Harris Corporation
Hartoin, Thomas W.
Jancuk, Jerome B.
Krauss, Jeffrey
Langner, John W.
Late Night Software
Mor, Jack
Morgan, Brian
Murray, Ray
Nakamura, Jiro
Open Systems Solutions, Inc.
Paul, Craig
PrivaFone
Raetz, George
Roberts, Brian S.
Salo, Lawr V.
Sergeant, Steven
Snider, Philip M.
Snyder, Eric E.
Southwestern Bell Mobile Systems, Inc.
Tandy Corporation
Truran, David
Ulfers, Bernhard G.
Uniden America Corporation
Vanguard Cellular Systems, Inc.
Wells, William C.
Whittingham, Duane
Wilkinson, Charles E.
Youngberg, Mike
Zimmer, Roy

Parties filing reply comments in this proceeding:

Cellular Telecommunications Industry Association
Consumer Electronics Group of the Electronics Industries Association
Fleet Call, Inc.
McCaw Cellular Communications, Inc.
NYNEX Mobile Communications Company
Uniden America Corporation

APPENDIX B

Part 2 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2--FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 154(i), 302, 303, 303(r) and 307.

2. Section 2.975 is amended by adding a new paragraph (a)(8) to read as follows:

Section 2.975 Application for notification.

(a) * * *

(8) Applications for the notification of receivers contained in frequency converters designed or marketed for use with scanning receivers shall include a statement describing the methods used to comply with the design requirements of Section 15.121(a) of this Chapter or the marketing requirements of Section 15.121(b) of this Chapter.

* * * * *

3. Section 2.1033 is amended by adding a new paragraph (b)(12) to read as follows:

Section 2.1033 Application for certification.

* * * * *

(b) * * *

(12) Applications for the certification of scanning receivers shall include a statement describing the methods used to comply with the design requirements of Section 15.121(a) of this Chapter or the marketing requirements of Section 15.121(b) of this Chapter.

* * * * *

Part 15 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 15--RADIO FREQUENCY DEVICES

1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303 and 307.

2. Section 15.37 is amended by revising paragraph (b), and adding a new paragraph (f), to read as follows:

Section 15.37 Transition provisions for compliance with the rules.

* * * * *

(b) * * * In addition, receivers are subject to the provisions in paragraph (f) of this Section.

* * * * *

(f) The manufacture or importation of scanning receivers, and frequency converters designed or marketed for use with scanning receivers, that do not comply with the provisions of Section 15.121 of this Part shall cease on or before April 26, 1994. Effective April 26, 1993, the Commission will not grant equipment authorization for receivers that do not comply with the provisions of Section 15.121 of this Part. This paragraph does not prohibit the sale or use of authorized receivers manufactured in the United States, or imported into the United States, prior to April 26, 1994.

3. Section 15.121 is added to read as follows:

Section 15.121 Scanning receivers and frequency converters designed or marketed for use with scanning receivers.

(a) Except as provided in paragraph (b), scanning receivers, and frequency converters designed or marketed for use with scanning receivers, must be incapable of operating (tuning), or readily being altered by the user to operate, within the frequency bands allocated to the Domestic Public Cellular Radio Telecommunications Service in Part 22 of this Chapter (cellular telephone bands). Receivers capable of "readily being altered by the user" include, but are not limited to, those for which the ability to receive transmissions in the cellular telephone bands can be added by clipping the leads of, or installing, a simple component such as a diode, resistor and/or jumper wire; replacing a plug-in semiconductor chip; or programming a semiconductor chip using special access codes or an external device, such as a personal computer. Scanning receivers, and frequency converters designed or marketed for use with scanning receivers, must also be incapable of converting digital cellular transmissions to analog voice audio.

(b) Scanning receivers, and frequency converters designed or marketed for use with scanning receivers, that are manufactured exclusively for, and marketed exclusively to, entities described in 18 U.S.C. Section 2512(2) are not subject to the requirements of paragraph (a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

ORDER

Adopted: April 8, 1993; Released: April 9, 1993

By the Commission: Commissioner Marshall not participating.

1. Daniels Cablevision, Inc. and Time Warner Entertainment Co. have filed requests for a stay pending judicial review of our order of April 1, 1993 in this proceeding freezing the rates for cable services, other than premium and pay-per-view service offerings, provided by cable systems subject to regulation under the Cable Act of 1992.[1] *Freeze Order*, 58 Fed. Reg. 17530 (Apr. 5, 1993). The *Freeze Order* became effective on April 5, 1993, upon publication in the Federal Register and extends for 120 days. The order was adopted at the same time as, and designed to support implementation of, a *Report and Order* in this proceeding (FCC 93-177) establishing rules to implement rate regulation of cable service as required under §§3, 9 and 14 of the Cable Act of 1992, 47 U.S.C. 543, 532 and 542(c). That *Report and Order* has not yet been released. The purpose of the freeze is to prohibit cable systems from increasing their aggregate rates during the period between adoption of the rate regulation rules and the time when we expect that they can be effectively implemented by the FCC and local authorities. *See Freeze Order* at ¶ ¶ 3-4.

2. Daniels' motion relies almost exclusively on claims that the *Freeze Order* unlawfully burdens its First Amendment speech rights. Specifically, Daniels alleges that the *Freeze Order* is a "content-based restraint on 'press' and 'speech' activity," which bars "cable operators' exercise of editorial discretion in the selection and arrangement" of communications over their cable systems. Daniels Motion at 1-2, 3. As such, Daniels claims, the *Freeze Order*, "on its face, constitutes an impermissible 'burden' and an unconstitutional prior restraint on communication and on communicative activity under the First Amendment." *Id.* at 2. Daniels asks the Commission to stay the *Freeze Order* "pending final administrative and judicial resolution of the substantial constitutional question raised by the agency's action." *Id.* at 4.

3. Like Daniels, Time Warner alleges that the freeze will impinge upon its First Amendment rights. *See* Time Warner Motion at 7-8. However, Time Warner also argues (Motion at 3) that the *Freeze Order* is arbitrary and capricious because it "will lead to anomalous results creating irreparable injury" in at least two particular situations--where an existing subscriber switches from a less expensive to a more expensive tier of regulated service and where the cable system "enhance[s] the value of existing regulated services by adding channels, either because of added channel capacity due to a rebuild or because of a new affiliation with a cable programming service."

4. We deny both motions for stay. Daniels' constitutional claim is based upon a mischaracterization of the nature of the *Freeze Order* and does not justify the extraordinary relief Daniels seeks. First, contrary to Daniels' misstatement, the *Freeze Order*, on its face, imposes no content-based restriction on speech or any burden on the exercise of editorial discretion. Rather, the order simply prohibits--for a short period of 120 days--aggregate increases above the rates that the cable companies, as previously unregulated entities, had voluntarily set for their services as of the date the freeze begins. This freeze applies without regard to the content of the cable services and, notably, does not preclude cable operators from repackaging the services they provide and restructuring their rate design as long as the "average monthly subscriber bill," calculated across all regulated services, does not increase. *Freeze Order* at ¶ 4 & n.7.

5. In addition, the Commission committed to "consider lifting this freeze for a particular cable operator if it can show that the freeze would impose severe economic hardship." *Freeze Order* at n.6. Neither Daniels nor Time Warner has made any attempt to invoke this procedure by making a particularized showing of economic hardship.[2] Given this waiver procedure, and the fact that the frozen rates were voluntarily established in a non-competitive environment, we find no basis for the claim that the freeze would have any impact on the exercise of First Amendment rights at all.

6. Finally, the purpose of the *Freeze Order* is unrelated to the suppression or promotion of a particular viewpoint. Rather the order simply helps to ensure, consistent with the Cable Act of 1992, that rates for cable services are reasonable. *Freeze Order* at ¶ 3 & n.10 (citing 47 U.S.C. 543(b)(1) & (h)). Thus, to the extent that the freeze implicates free speech concerns at all, it demonstrably is *not*

[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] Indeed, Daniels has not alleged that it would suffer *any* monetary loss as a result of the freeze. Even if Daniels had made such allegations, it is difficult to imagine that a showing could be made that any monetary loss occasioned by freezing for 120 days rates that previously had been unregulated would meet the standard for irreparable injury. Courts have held that mere monetary losses, unless they threaten the very existence of the movant's business, do not constitute irreparable injury for purpose of staying an agency order. *See, e.g., Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

content based,[3] but rather lawful content-neutral economic regulation of the type that consistently has been found to survive constitutional scrutiny.[4]

7. We do believe, however, that Time Warner's claim that the freeze will lead to anomalous results warrants clarification of the *Freeze Order*. Time Warner asserts that the cap on the "average monthly subscriber bill" set out in the *Freeze Order* will have the consequence of forcing cable operators to prohibit customers from upgrading from less expensive to more expensive services, or forcing the cable operators not to levy the increased charges that would otherwise be associated with such an upgrade. Time Warner Motion at 3. Otherwise, Time Warner asserts, the "average monthly subscriber bill" would increase, without any change in rate schedules, simply by virtue of the customers' voluntary decisions to purchase an existing, more expensive service package. *Id.* Time Warner also claims that the freeze will effectively prevent cable operators from offering additional channels beyond those available prior to the freeze, because even though the provision of those additional channels would increase the cable operators' costs, the cable operators would be prohibited from charging for those additional channels. Time Warner Motion at 3-4.

8. We did not intend in the *Freeze Order* to mandate these results. To the extent that it may be read in such a manner, we clarify the order as set forth below.[5] The purpose of the order was to "protect consumers" against rate *increases* while "permit[ting] cable operators to make reasonable changes in service offerings . . . ." *Freeze Order* at ¶ 4. The average monthly bill limit was intended to permit changes in individual rate components while constraining increases in overall rate levels. Given that purpose, a cable operator that makes *no* changes in its rates or services after April 5, 1993 will not be found in violation of the freeze even if its "average monthly subscriber bill" increases as a result, for example, of Time Warner's hypothetical situation of voluntary subscriber upgrading. Thus, if the specific rates in question were "in effect"[6] on the effective date of the *Freeze Order*, changes in subscriber demand that alter the average bill will not be interpreted as conflicting with the *Freeze Order*. Further, as explicitly set forth in that order, we anticipate that there will be changes in rate structures during the freeze period. Indeed, one of the functions of the freeze is to permit rate structure changes to take place in an environment where rate increases are not also being implemented. In this respect, the freeze was designed so that, as the substantive rate regulation process commences, much of the restructuring process will have taken place and subscribers, local regulatory authorities, and the Commission may focus on regulating or rolling back rates to the correct rate level. We view these kinds of rate structure changes as not calculated or designed to increase the "average monthly subscriber bill," and they, accordingly, are not prohibited under the *Freeze Order*. Moreover, although overall increases in existing rate levels are precluded during the freeze period, contrary to Time Warner's assertion, the addition of new services is not foreclosed. New services may be added even if they increase subscriber demand for a higher priced service tier as long as the rate constraint is observed. Alternatively, a new service may be provided and charged for as an entirely new, optional service, unrelated to any existing service tier or existing rate.[7]

9. We do not agree with Time Warner's suggestion that the freeze on the "average monthly subscriber bill" will have the undesirable effect of either delaying new services or forcing a cable operator to accept significantly increased costs associated with those new services. This is particularly true in light of the limited duration of the *Freeze Order*. In this regard, we note that Time Warner's claim of irreparable injury is based exclusively on hypothetical possibilities and is completely unsupported by specific factual data. As discussed above, we have expressly provided for lifting the freeze in individual cases where "severe economic harm" is shown.

10. In the *Freeze Order*, we found that the 120-day freeze served the public interest by preventing cable operators from unfairly raising rates during the interim period until the Act could be fully implemented through a detailed regulatory structure that we have adopted but which has not yet taken effect. *Freeze Order* at ¶ 3. Neither Daniels nor Time Warner has provided any reason to reassess that public interest finding.

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), that the motions for stay filed by Daniels Cablevision, Inc. and Time Warner Entertainment Co. are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[3] *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral" where, as here, "it is justified without reference to the content of the regulated speech"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 47 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) ("the important inquiry here . . . turns on the purpose for which government regulates").

[4] *See Associated Press v. United States*, 326 U.S. 1 (1945); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 689, 800-02 (1979); *Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1557-62 (M.D. Ala. 1992).

[5] Time Warner acknowledged that "if the Commission were to issue a clarification avoiding the anomalous results set forth in the text, this would moot TWE's appeal to the extent that it attacks these aspects of the Freeze Order." Time Warner Motion at 5 n.2.

[6] Rates "in effect" include rates for all services being offered by a system and actually being charged subscribers prior to the effective date of the *Freeze Order*. Included are rates that are in effect with respect to some subscribers, even if they are subject to a staggered billing process, regardless of whether all subscribers had received bills on the effective date of the order. It is not intended that the freeze result in different rates being charged system subscribers for the same services based on billing cycles. Similarly, if portions of a system have been upgraded and higher rates are in effect for expanded service offerings, that upgrading process may continue with the rates in effect for this service being charged to subscribers as they convert to new levels of service.

[7] The *Freeze Order* also does not impair the ability of cable operators to offer and charge for new "premium" services or other programming services offered on an *a la carte* basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: Apri1 21, 1993

PLEADING CYCLE ESTABLISHED FOR JOINT PETITION OF CFA AND NCTA FOR RULEMAKING AND REQUEST FOR ESTABLISHMENT OF A JOINT BOARD

RM-8221

On April 8, 1993, the Consumer Federation of America (CFA) and the National Cable Television Association, Inc. (NCTA) petitioned the Commission for the commencement of a rulemaking to establish separations, cost accounting and cost allocation rules for video dialtone service and for the establishment of a Federal-State Joint Board to recommend procedures for separating the cost of local telephone company plant that is used jointly to provide telephone service and video dialtone. CFA and NCTA state that generic standards will safeguard the public and promote competition in the video marketplace.

Interested parties should file comments on this petition by **May 21, 1993** and reply comments by **June 7, 1993.** Comments should be filed with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Copies should also be sent to the Commission's contractor for public service records duplication, International Transcription Services, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

We will treat this proceeding as nonrestricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. Sections 1.1200-1.1216. For further information, contact Peggy Reitzel, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-1300.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Jim Rogers
Washington Telecom Week

FOIA Control
No. 93-38

On Request for
Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: April 13, 1993; **Released: April 19, 1993**

By the Commission:

1. The Commission has under consideration an Application for Review received on March 15, 1993 from Mr. Jim Rogers (Rogers). Rogers seeks review of a March 4, 1993, decision by the Acting General Counsel, which granted in part Rogers' request under the Freedom of Information Act (FOIA), 5 U.S.C. §552, for access to the transition papers prepared by the Commission for the Clinton Administration. The Acting General Counsel denied access to limited portions of the documents pursuant to FOIA exemptions 2, 5 and 7. 5 U.S.C. §§552(b)(2), (b)(5), (b)(7).

2. In his Application for Review, Rogers generally suggests that the Acting General Counsel improperly applied the FOIA exemptions, but Rogers does not provide any specific support for his claims. We have carefully reviewed the withheld materials and conclude that the Acting General Counsel properly determined that the withheld portions of the requested documents are within FOIA Exemptions 2, 5 and 7. Further, we reject Rogers' assertion that the materials have been "widely distributed" and thus do not qualify for withholding. This agency has not in any respect waived FOIA exemption protection by permitting public disclosure of the withheld transition materials, nor are we aware of any distribution of the redacted portions of the documents to persons outside the FCC, the Federal government or the Clinton transition team.[1]

3. In view of the foregoing, the Application for Review filed by Rogers IS DENIED. Rogers may seek judicial review of this decision pursuant to 5 U.S.C. §552 (a)(4)(B).

4. The officials responsible for this decision are the following Commissioners: James H. Quello, Chairman, Sherrie P. Marshall, Andrew C. Barrett, and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] We note that the burden is on the requester to specifically show that any withheld information has in fact been made public. *See Dow, Lohnes & Albertson v. Presidential Comm'n on Broadcasting to Cuba*, 624 F. Supp 572, 578 (D.D.C. 1984); *United States Student Ass'n v. CIA*, 620 F. Supp 565, 571 (D.D.C. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

ORDER

Adopted: April 1, 1993; Released: April 1, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. In this *Order*, we freeze for 120 days rates for cable services, other than premium and pay-per-view service offerings, provided by cable systems subject to regulation under the Cable Television Consumer Protection and Competition Act of 1992.[1]

II. DISCUSSION

2. In a *Report and Order* adopted on April 1, 1993 we are establishing regulations to implement rate regulation of cable service as required under the Cable Act of 1992.[2] Those standards and procedures govern regulation of the rates of the basic service tier by franchising authorities, and by the Commission in individual instances of rates for cable programming services. We anticipate that our regulations will become effective approximately 75 days after adoption,[3] and that, as a practical matter, it will take an additional period of time for franchise authorities to become certified to regulate the basic service tier,[4] and for consumers to be able to file complaints to invoke Commission oversight of rates for cable programming services.

3. We are concerned that during the period between the adoption of our rules and the date that a local franchising authority can establish regulation of the basic service tier rates, and that consumers can file complaints with the Commission concerning potentially unreasonable rates for cable programming services, cable operators could raise rates, effectively undermining the statutory purpose of reasonable rates pending implementation of our rules. In particular, cable operators would be able to raise rates prior to the initiation of regulation that would otherwise govern their ability to raise rates from existing levels. Therefore, as of the date of publication in the Federal Register of this *Order* and necessary rule changes, we are freezing for 120 days the rates for cable services, other than premium channel or pay-per-view services, offered by systems subject to rate regulation under the Cable Act of 1992.[5] This should provide sufficient time for our regulations to become effective, local authorities to become certified to regulate the basic service tier, and consumers to become familiar with necessary local and federal procedures. In addition, the rate freeze should not harm cable operators because current rates will remain in effect and because this freeze is of relatively brief duration.[6]

4. This freeze will be effectuated by requiring that the average monthly subscriber bill for services subject to rate regulation under the statute may not increase above the average monthly subscriber bill determined under rates in

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[1] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, §§ 3,9,14, 106 Stat. 1460 (1992) ("Cable Act of 1992"). This freeze will apply to rates in effect as of the date of publication of this *Order* and implementing rule changes in the Federal Register.

[2] *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation FCC No. 93-177, adopted April 1, 1993. ("*Report and Order*").

[3] The Administrative Procedure Act requires that in most cases substantive rules be published in the Federal Register at least 30 days prior to their effective date. *See* 5 U.S.C. §553(d); *See also* 47 C.F.R. §1.427. We anticipate that the *Report and Order* will be released approximately 30 days after adoption, and that our regulations will be printed in the Federal Register within 15 days after that. Thus, under this schedule, our regulations would become effective approximately 75 days after adoption. Further, our regulations involving information collection require approval of the Office of Management and Budget under the Paperwork Reduction Act. *See* 44 U.S.C. §3507(b).

[4] *See* 47 U.S.C. §543.

[5] The Cable Act of 1992 provides that only cable systems not subject to effective competition as defined in the statute are subject to rate regulation. Under the statute a system is subject to effective competition if: (A) fewer than 30 percent of the households in the franchise area subscribe to a cable system; (B) the franchise area is (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or (C) the franchising authority itself is a multichannel video programming distributor and offers video programming to at least 50 percent of the households in the franchise area. *See* Communications Act, §623(1)(1), 47 U.S.C. § 543 (1)(1). For purposes of the freeze, each cable operator will have the responsibility of determining in good faith whether it is subject to effective competition as defined in the statute. Cable operators not subject to effective competition as defined in the statute who raise rates in violation of the freeze will be subject to forfeitures. *See* Communications Act, §§ 503(b), 47 U.S.C. §§ 503(b).

[6] We will entertain petitions for emergency relief from cable operators. We will consider lifting this freeze for a particular

effect on the Federal Register publication date.[7] This freeze does not preclude adding subscribers, retiering, or the providing of additional equipment and services as long as the average monthly subscriber bill for these services does not increase over the level as of the Federal Register publication date.[8] Cable systems may additionally increase the charge for a tier or provision of equipment as long as the average monthly subscriber bill does not increase over the level as of the Federal Register publication date. This flexibility will simultaneously permit cable operators to make reasonable changes in service offerings in response to the rules we establish for rate regulation under the Cable Act of 1992 and still protect consumers.

5. We find good cause under the Administrative Procedure Act to make this freeze effective upon publication in the Federal Register.[9] As explained, absent a freeze cable operators could raise rates prior to the first practical opportunity for local authorities and the Commission to regulate rates for the basic service tier and cable programming services, effectively thwarting the statutory intent of reasonable rates. Accordingly, we will make this freeze effective upon publication of this *Order* and implementing rule changes in the Federal Register. We additionally find that we have sufficient authority to impose this freeze.[10]

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 543, that rates for cable services offered by cable systems subject to regulation under Section 623 of the Communications Act ARE FROZEN as of the date of publication of this *Order* in the Federal Register for 120 days as described in this *Order*.

7. IT IS FURTHER ORDERED, that Part 76 of the Commission's rules is amended as set forth in the attached Appendix.

8. IT IS FURTHER ORDERED, that this *Order* IS EFFECTIVE upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The current authority for Part 76 is suspended.

2. A new authority citation is added for Part 76 to read as follows:

Authority: 47 U.S.C. §§ 151, 152, 153, 154, 301, 302, 303, 307, 308, 309, 532, 533, 535, 543, 552.

3. Part 76, Subpart O, is added to read as follows:

Table of Contents

76.1090 Temporary Freeze of Cable Rates

§ 76.1090 *Temporary Freeze of Cable Rates*

(a) The average monthly subscriber bill for services provided by cable operators subject to regulation under Section 623 of the Communications Act shall not increase above the average monthly subscriber bill determined under rates in effect on April 5, 1993 for a period of 120 days.

(b) The average monthly subscriber bill shall be calculated by determining for a monthly billing cycle the sum of all billed monthly charges for all cable services subject to regulation under Section 623 of the Communications Act and dividing that sum by the number of subscribers receiving any of those services. The average monthly sub-

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cable operator if it can show that the freeze would impose severe economic hardship or threaten the viability of continued cable service.

[7] The average monthly subscriber bill shall be calculated by determining for a monthly billing cycle the sum of all billed monthly charges for all services subject to rate regulation under Section 623 of the Communications Act and dividing that sum by the number of subscribers receiving any of those regulated services. Services subject to rate regulation under Section 623 of the Communications Act are the basic service tier, cable programming services tiers, and equipment used to receive either the basic service tier and/or cable programming services tiers. The average monthly subscriber bill determined under rates in effect on the Federal Register publication date shall be calculated based on customer charges for the most recent monthly billing cycle ending prior to the Federal Register publication date.

[8] Under the Cable Act of 1992, rates for video programming offered on a per channel or per event basis are not subject to regulation. Thus, the freeze does not preclude cable operators from raising rates for such services. In addition, in the *Report and Order* we have determined that equipment that is used only to receive unregulated programming is not subject to regulation. The freeze does not prohibit rate increases for such equipment.

[9] The Administrative Procedure Act generally requires publication in the Federal Register of substantive rules 30 days prior to their effective date but permits substantive rules to become effective with less than 30 days advance publication in the Federal Register for good cause. *See* 5 U.S.C. §553(d)(1); *See also* 47 C.F.R. §1.427(b).

[10] Section 623(b)(1) of the Communications Act provides that "[t]he Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable" in situations where a cable system is not subject to effective competition. This section provides sufficient authority for the Commission to freeze rates for the basic service tier in order to assure that rates for the tier are reasonable under the regulations we are adopting in the *Report and Order*. The Cable Act of 1992 also requires that the Commission establish regulations to prevent evasions of rate regulation. *See* 47 U.S.C. Section 543(h). If the Commission froze only basic service tier rates, cable operators could evade the freeze by retiering to move programming from the basic tier to higher tiers. This would thwart the intended effect of the freeze of assuring that rates for the basic service tier are reasonable because it would permit the cable operator to charge the frozen basic service tier rate for fewer channels on the basic tier. Thus, the freeze of cable programming services is necessary to fully effectuate the freeze for the basic service tier and is within the scope of our authority under Sections 623(b)(1) and 623(h). Section 4(i) of the Communications Act, 47 U.S.C. Section 154(i), also provides support for our action.

scriber bill determined under rates in effect on April 5, 1993 shall be calculated based on customer charges for the most recent monthly billing cycle ending prior to April 5, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U S West Communications, Inc. — Transmittal No. 336

Tariff F.C.C. No. 4

ORDER

Adopted: April 21, 1993; Released: April 21, 1993

By the Chief, Tariff Division:

1. U S West Communications, Inc. (US West) filed Transmittal No. 336 on March 8, 1993, to establish three types of calling plans for its interstate IntraLATA MTS (message telecommunications service) customers in North Dakota. All three plans provide discounts based on volume of usage, and allow customers to combine their intraLATA interstate and intrastate minutes to reach the minimum usage levels. Tr. 336 Description and Justification at para. 1.2. Transmittal 336 is scheduled to become effective on April 22, 1993.

2. On March 23, 1993, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, suspend and investigate Transmittal 336. US West replied to MCI's petition on April 2, 1993. MCI argues that the proposed plan should not be allowed to take effect until 1-plus equal access for intraLATA service is implemented in North Dakota. MCI Petition at 2. MCI argues that the Commission should not grant US West such pricing flexibility for an area where US West is capable of establishing an "interstate monopoly." *Id.*

3. US West argues that MCI has not addressed the merits of the tariff and has presented no evidence or arguments sufficient to justify either rejecting or suspending Transmittal 336. US West Reply at 2. US West also argues that the instant tariff proceeding is not the appropriate forum for MCI to object to federal or State equal access requirements. *Id.* at 3.

4. The Bureau has reviewed Transmittal 336 and all associated pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, suspend and investigate U S West Communications, Inc.'s Tariff F.C.C. No. 4, Transmittal No. 336, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 92-234

In the Matter of

Inquiry into Encryption
Technology for Satellite
Cable Programming

REPORT

Adopted: April 1, 1993; Released: April 29, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. The Commission initiated this examination of encryption technology for satellite cable programming in response to a request from members of Congress to "(1) review efforts to develop at least one additional source of video descrambling modules compatible with de facto industry standards for use of the C-band, and (2) review the feasibility of ensuring that all legal and compatible descrambling modules be eligible for authorization through the Direct Broadcast Satellite (DBS) Authorization Center."[1] The Commission also took the opportunity of this inquiry to address related technological issues, such as the feasibility and utility of a standard decoder interface that would permit a single integrated receiver descrambler or IRD (a satellite receiver with a built-in decoder) to function with multiple encryption systems and the implications of the apparent trend toward digital transmission of video, whether for advanced television (ATV) or compressed standard television signals, and their impact on encryption technology.[2]

2. The Commission's Notice in this proceeding provides background information on the home satellite dish (HSD) industry.[3] We shall not repeat that history here. However, we do note that, as we opened our inquiry, there was one firm, Titan Satellite Systems, Inc., proposing to provide a competitive source of modules "compatible with de facto industry standards for use of the C-band." That de facto standard is the Videocipher II (VC II) technology, for which General Instrument Corporation (GIC) owns patents.[4] Competition to GIC from an additional supplier of compatible modules (if it were feasible) could lead to lower decoder prices for consumers. Our discussion below of such "intra-VC II" competition of necessity concentrates on the only firm that had an entry proposal.[5]

3. The following three sections of this Report address competition in supplying decoder modules, access to the GIC DBS Authorization Center, and other technological issues, respectively. While commenters are generally in favor of competition as a matter of principle, there is disagreement over how to balance its benefits against possible adverse effects on security and other costs. Programmers, who are in the first instance the consumers of encryption systems, did not speak out in favor of intra-VC II competition. Some commenters suggested that inter-system competition would be more important than intra system competition.[6] With regard to DBS Center access, commenters (including Titan) generally did not support mandatory access, for reasons that ranged from the asserted low cost of building alternative access centers to the judgment that it does not make good business sense to utilize a facility owned by a rival to implement one's own conditional access system.

4. Commenters generally agree that the change from analog to digital transmissions will be gradual and that, during the transition, it is likely that "hybrid" digital/analog decoders would be available. Many commenters endorse the concept of a standard decoder interface, but most oppose government action to mandate it. Commenters generally believe that it is useful for the Commission to monitor and focus attention on encryption technology and compatibility issues, but that no Commission action is warranted at this time.

II. COMPETITION IN DECODER MODULE SUPPLY

5. Commenters are uniformly in favor of competition, all other things being equal, citing benefits of reduced costs

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[1] Letter of Edward J. Markey and C. Thomas McMillen, Members of Congress, to the Honorable Alfred Sikes, Chairman, Federal Communications Commission. July 6, 1992. See also Letters of the Honorable Alfred C. Sikes to the Honorable Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives and to the Honorable C. Thomas McMillen, U.S. House of Representatives. July 31, 1992.

[2] ATV is also sometimes referred to as high definition television (HDTV). NTSC stands for National Television Systems Committee and refers to the current broadcast television transmission standards in use in the United States.

[3] Notice at paras. 4-11.

[4] GIC has produced three generations of Videocipher II decoder. The first is the referred to simply as Videodipher II (VC II). The Videocipher II Plus (VC II Plus) combined all security functions on a single very large scale integrated circuit chip. The Videocipher II Plus Renewable Security (VCRS) module uses the VC II Plus technology but also can accept a "smart card" that could implement a security upgrade. The later generations of decoder build on the original VC II in many respects and utilize the basic VC II patents co-owned by Titan as well as some additional technology proprietary to GIC.

[5] Intra-VC II competition refers to competition between Videocipher based encryption/conditional access systems, each of which utilizes the same encrypted program signal, but which have different authorization data streams. The authorization data streams are themselves encrypted differently for each system. The potential source of intra-VC II competition analyzed herein is Titan.

[6] Inter-system competition is competition between encryption/conditional access systems applied to different programming feeds, in which both the encryption of programming and the authorization data stream are different. The Hughes DirecTV DBS system is an example of potential inter-system competition to Videocipher. See para. 13 below.

and incentives to innovate.[7] With regard to intra-VC II competition, some commenters raised questions about possible increased vulnerability to theft of services and increased difficulties of dealing with a security breach in a regime of compatible but different systems.[8] A few commenters addressed the current state of competition, with reference to the role of Channel Master as a second source of Videocipher modules provided under license of GIC. Other commenters took the opportunity to suggest that intersystem rather than intrasystem competition was more likely to bring benefits to consumers.

6. *Intrasystem competition.* In addition to the standard competitive benefits of lower price and increased innovation, a few commenters also suggest that competitive decoder suppliers might respond more rapidly to security breaches.[9] HBO, one of three programmers to respond to the Notice, cautions that in evaluating a potentially competitive decoder system, it is necessary to consider additional factors, in particular the security of the alternative system.[10] We are inclined to give deference to programmers in this area, since they are, in the first instance, the consumers of encryption systems. That is, they choose which system to use and install equipment at their uplink sites that actually encrypts the programming and inserts into the signal the authorization data stream that permits authorized decoders to unscramble the programming.

7. None of the three programmers that chose to comment on the Notice--HBO, PrimeTime 24, and Netlink--advocate any government regulatory action to encourage Titan's entry, although PrimeTime 24 supports it.[11] HBO counsels the Commission not to "substitute its judgment for that of programmers" and to "continue to permit programmers, who are the initial purchasers of encryption technology and who have the most at stake in creating a secure distribution system for their services, to exercise their independent judgment regarding the security of alternative analog encryption systems."[12] HBO notes the importance of security and suggests that the speculative benefits from entry such as that of Titan do not outweigh security risks. Programmer doubts about Titan's entry prospects might be inferred from the fact that most programmers did not even bother to comment in this inquiry, although Titan suggests that this is due to fear of GIC.[13] However, there is nothing in the record to substantiate this suggestion.

8. The primary debate in the comments over Titan's prospective entry occurs in the comments of Titan and GIC. Titan accuses GIC of anticompetitive conduct including altering or planning to alter the uplink equipment it supplies to programmers in such a way as to make it impossible to insert authorization information in the Horizontal Blanking Interval (HBI) of programmers signal, something required by the Titan system.[14] Titan also claims that GIC has falsely claimed that certain interfacing of GIC and Titan equipment at programmers' uplink sites would violate programmers' software license with GIC. Titan asserts that its system is secure and cost-effective and could, with limited effort and cooperation from GIC and programmers, operate side-by-side with the GIC system.

9. In turn, GIC asserts that Titan "should have the burden of demonstrating the feasibility of incorporating its system into the existing encryption and access control system used by the HSD market, particularly with respect to security requirements" and goes on to claim that Titan has failed to do so.[15] In addition to raising broad questions about the security of Titan's system and its hardware,[16] GIC also expresses concern regarding Titan's proposal to place a piece of its equipment, the Message Processor Unit, in between two pieces of GIC equipment at programmers' uplink sites. GIC suggests that this poses a security risk and a threat to the smooth functioning of the system, which GIC is obligated to maintain.[17] GIC also notes that the Titan system depends on the same basic program keys to decode the signal as the GIC system does. GIC suggests that, in response to a security break, it might want or need to change the way that those keys are processed.[18] This could end up disabling not only pirate decoders but legitimate Titan decoders too. Thus, suggests GIC, coexistence with the Titan system could limit its ability to respond to security problems. GIC also suggests that a comparison of its wholesale decoder module price ($336) with Titan's proposed price ($249) is not meaningful because the ancillary services, such as continuing activities to maintain security, are not specified for the Titan system.[19]

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[7] Motion Picture Association of America (MPAA) Comments at 2; Scientific Atlanta (SA) Comments at 3-6; PrimeTime 24 Comments at 3-4; News Datacomm Comments at 13-14; Home Box Office (HBO) Comments at 10-12.

[8] Theft of satellite services has been a major problem over the years. In an effort to combat theft, GIC and a coalition of programmers have provided legitimate Videocipher II subscribers a free upgrade to the VCRS. *See* note 4 above. *See also* Notice at paras. 8-9. Unfortunately, the use of the Videocipher II technology for commercial decoders permits continuing theft of services via consumer VC II units. To combat this, HBO and Showtime have announced plans for an upgrade to VCRS of commercial units to be completed in 1993. *See* HBO Comments at 10 and Tom Middleton, "Showtime Sets Commercial Upgrade." *Satellite Business News*, Mar. 24, 1993, pp. 1, 22.

[9] PrimeTime 24 Comments at 4; SA Comments at 3.

[10] HBO Comments at 12, 14, 25. *See also* GIC Comments at 12-15.

[11] PrimeTime 24 Comments at 3. For a qualified endorsement, see Consumer Satellite Systems (CSS) Reply at 4.

[12] HBO Reply at 2, 8.

[13] Titan Reply at 3.

[14] The Titan claims described in this paragraph are found it Titan Comments at 16-34.

[15] GIC Reply at 3. GIC denies that its phaseout of the HBI is anticompetitive, asserting that it "represents a first step to upgrade programmers' uplink scramblers to ensure that pirated Videocipher II units are disabled and the old hardware cannot be reused." *Id.*, at 6. We cannot resolve this question. However, we agree with CSS that the HBI is not inherently a less secure portion of the signal than the vertical blanking interval (VBI), where the Videocipher Plus Renewable Security authorization datastream is located. *See* CSS Reply at 8-9.

[16] *Id.*, at 3-11.

[17] *Id.*, at 7-8.

[18] *Id.*, at 5-6.

[19] GIC Comments at 12-15. As the decoder module moves through the distribution chain from manufacturer to wholesaler to retailer to consumer, its price is marked up. Titan applies certain markup assumptions to assert that the implicit retail price of the GIC module is $717.95. Titan Comments at 12. GIC contests this calculation, asserting that its new "open distribution" policy has "significantly broadened availability of outlets of decoders." GIC Reply at 9. Now distributors and other entities such as programmers and program packagers can purchase modules directly and sell them directly to retailers or consumers. As a consequence, markups may be reduced. GIC cites several recent advertisements in which program distributors

10. The two encryption systems are both technically very complex and neither Titan nor GIC provided proprietary details for the record in this proceeding. For that reason, the Commission is unable to evaluate all of the assertions made regarding the two systems. However, based on the record before us, we cannot dismiss as unfounded the reservations of GIC and HBO with regard to the difficulties of coexistence between the GIC and Titan systems. In particular, GIC's concerns about guaranteeing the integrity and smooth functioning of its system when a Titan product is inserted into the chain of GIC equipment at uplink sites, and GIC's concern that its ability to respond to a security break would be constrained by the necessity to coordinate with the Titan system appear genuine. We do not pass judgment on the validity of these concerns, but we do not see them as strictly motivated by anticompetitive impulses either.

11. Recently Titan announced that it was suspending its efforts to enter the consumer decoder market.[20] Titan suggested that the primary reason for this was the failure of any programmers to agree to use its system to authorize customers. Titan has not ruled out a re-entry at a later date.

12. *Channel Master as a Second Source.* GIC also asserts, supported by Netlink, that intrasystem competition currently exists by virtue of Channel Master's position as a second source licensee for Videocipher modules.[21] Titan claims that Channel Master is little more than a GIC distributor, receiving completed modules from GIC and performing only minor operations to prepare them for sale. Channel Master asserts that it has always retained discretion under its GIC license to fabricate modules in-house or contract out that work.[22] Channel Master implies that the decision on fabrication has been made based on cost factors. We see no reason to doubt Channel Master's assertions. Moreover, we accept Channel Master's representation that it competes with GIC on non-price dimensions such as "shorter lead time and faster warranty repair turn-around time."[23] Nevertheless, we remain convinced, as we were in the Notice, that the scope for competition is limited by the requirement that Channel Master purchase key proprietary chips from GIC regardless of who actually assembles the decoder module.

13. *Intersystem competition.* Some commenters suggest that the major competitive pressure on C-band decoders will come from completely separate systems.[24] These commenters note that PrimeStar, a medium powered Ku band service, uses a Scientific Atlanta system, and that the proposed DirecTV (a Hughes subsidiary) and United States Satellite Broadcasting (a subsidiary of Hubbard Broadcasting) DBS services will use a News Datacom encryption system. Hubbard recently announced agreements to carry HBO, Showtime, and some other Viacom services on its DBS service, while Hughes had earlier secured agreements with the Disney channel and Paramount's pay-per-view arm.[25] These developments lend credibility to the idea that DBS will, in fact, offer programming comparable to that available via C-band and hence will exert pressure on C-band equipment costs. Hughes claims that its reception equipment will retail for $700. This compares to $2100-$2500 for the average C-band system and $1400 for a stripped down system that can receive programming from only one C-band satellite (Galaxy 5, on which much popular cable programming is carried).[26]

14. If one assumes that DBS and C-band services will have similar programming, it appears likely that C-band reception system prices will have to decline, or else consumers would switch from C-band to DBS. In this regard, the figures provided by Consumer Satellite Systems (CSS) on the distributor cost of the components of a C-band satellite reception system are illuminating. CSS uses the wholesale price of a GIC Videocipher module of $336 and estimates the distributor cost of a complete system at $866-$911.[27] The module thus represents 37-42 percent of the total cost. CSS further asserts that, since 1986, the cost of another major component of the system--the receiver--has dropped 50 percent. CSS suggests that if GIC would sell module components directly to manufacturers, rather than supplying "a big circuit board in a plastic cage," prices would have been lower and manufacturers would have had the flexibility to build more compact IRDs.[28]

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offered consumers a decoder module and a programming subscription as a package deal. By subtracting out the programmers' advertised price for the programming alone, GIC calculated the implicit price for the decoder module in these offers. They range from $241-$359. *See* GIC Reply, Appendix A.

[20] See Mary Hillebrand, "Titan Halts Decoder Assault." *Satellite Business News*, Feb. 24, 1993, pp.1, 22,23. *See also* Letter from Tom Ortolf, President, Titan Satellite Systems Corp. Feb. 18, 1993 ("Ortolf Letter"), attached to "Additional Comments" of Consumer Satellite Coalition (CSC), filed March 10, 1993. (We accept this late filed submission.)

[21] *See* GIC Comments at 9-11, Netlink Reply at 2-3, Channel Master Comments at 2-3. GIC notes that "approximately 16" manufacturers are licensed to insert purchased modules in IRDs. GIC Comments at 10.

[22] Channel Master Reply at 3.

[23] Channel Master Comments at 3.

[24] DirecTV Comments at 3; HBO Comments at 4; Netlink Reply at 3; News Datacom Comments at 13-15. *See also* GIC Comments at 27-28 and HBO Comments at 19 (noting the presence of PrimeStar in the marketplace).

[25] See Mary Hillebrand, "USSB Nets Four Big Premiums." *Satellite Business News*, March 10, 1993, pp. 1, 21. *See also* "DirecTV Nets Disney, Paramount." *Satellite Business News*, Jan. 13, 1993, p. 35.

[26] See GIC Comments at 12 for the $2100 and $1400 figures. HBO Comments at 4 quotes plans of Hughes and Hubbard to offer DBS reception equipment for $700 and cites a Satellite Broadcasting and Communications Association estimate of $2500 as the average price for C-band systems.

[27] CSS Comments at 5-9.

[28] CSS Reply at 7-8. See also Titan Comments at 20-21 (detailing plans to offer its module without the plastic cage and later to "develop custom packages of security elements" that will permit manufacturers "to design the smart card access and security chip into the IRD as an integral element of the receiver and to remove component redundancy").

III. ACCESS TO THE GIC DBS AUTHORIZATION CENTER

15. With virtually no exception,[29] commenters do not support mandatory access to the GIC DBS Center for Titan or anyone else. GIC suggests that the DBS Center is not an essential facility under antitrust law, so mandatory access can not be required.[30] GIC's legal analysis went unchallenged by other commenters. DECTEC, although it opposes GIC's exclusive control of the DBS Authorization Center, asserts that [A]ccess to GIC's DBS Center is not necessarily critical to enable competition in the supply of compatible HSD decoding equipment. What is crucial is access to programming.[31] Moreover, 8 various other entities either have or will operate their own authorization centers. Those cited include PrimeStar, Hughes (for DirecTv), Tele-Communications, Inc. (TCI), and News Datacom.[32] HBO suggests that "[A]lthough a single DBS Center may foster certain efficiencies, establishing separate centers for separate DBS technologies does not appear to be a barrier to entry for competing encryption systems."[33] GIC estimates the cost of constructing an authorization center at $500,00-$2,000,000.[34]

16. Titan notes that it has constructed its own Titan Authorization Center, lending further support to the idea that lack of access to the GIC center is not a significant barrier to entry. Additionally, Titan concludes that it does not make good business sense to make use of an authorization center controlled by a competitor, although the technical barriers to shared use are small.[35] GIC suggests that the technical barriers are, in fact, large and that shared use compounds the security risks.[36]

17. We do not have the information to evaluate the technical questions regarding shared use of the DBS Center and hence we cannot reach any definitive conclusion regarding the feasibility of authorizing decoder modules from rival manufacturers via the GIC DBS Center. However, the question appears to be moot. Titan, the primary prospective entrant, built its own center, indicated that it would not want to use a center owned by a rival,[37] explicitly stated that it did "not seek Commission-sanctioned access to the General Instrument Center, as we are nearing completion of our own authorization center,"[38] and then suspended its own efforts to provide consumer decoders.[39] Because of this and what we know about the economics of authorization centers, we find that there is no public policy case for mandating access to the GIC DBS Center.

IV. OTHER TECHNOLOGICAL MATTERS

18. We also received some comments about the standard decoder interface proposal and the transition to digital transmissions. GIC is not particularly enthusiastic about the standard interface, but several other commenters are.[40] However, interface proponents, including potential rivals to GIC such as News Datacom, generally oppose a government mandated interface standard, preferring that the market resolve this issue. The development of smart card technology makes the standard interface more feasible.

19. The standard decoder interface issue is part of the larger issue of equipment interoperability. Scientific Atlanta (SA) emphasizes the importance of interoperability (calling it "a critical element for future systems") and defines it as "the ability of products and equipment designed and manufactured by one company to operate interchangeably in a system with products and equipment designed and manufactured by another company."[41] GIC noted that there are costs as well as benefits of interoperability.[42]

20. Commenters anticipate a gradual transition from analog to digital transmissions,[43] characterized by simulcasting of C-band analog signals and digital signals in the C and/or Ku bands, including DBS. Implicit estimates of the remaining availability of C-band transmissions range from nine to

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[29] DECTEC "urges the FCC to encourage General Instrument to relinquish administrative and technical control of the DBS Authorization Center to a neutral and not-for-profit entity." DECTEC Comments at 8. DECTEC later urges mandatory access based on the idea that authorization centers are multichannel video programming distributors under the 1992 Cable Act and subject to program access rules. DECTEC Reply at 2-3. We reject this interpretation. MPAA supports a mandatory access requirement "if such a move is technically feasible." MPAA Comments at 2. Consumer Satellite Coalition favors "eliminating GIC's control of the DBS Authorization Center." CSC Comments at 12. This position appears to stem from CSC's objections to electronic countermeasures ("ECMs") taken by GIC against suspected signal thieves, and CSC's opinion that many ECMs are mistaken.

[30] GIC Comments at 26-30.

[31] DECTEC Reply at 2.

[32] See GIC Comments at 27-28, HBO Comments at 19-20, DirecTV Comments at 3-4, News Datacom Comments at 13.

[33] HBO prefaces these remarks with the observation that, "*[A]ll things being equal*, if there are to be multiple competing scrambling systems, HBO would prefer that they all share a single DBS Authorization Center." HBO Comments at 19 (emphasis added). For other suggestions of cost savings from use of a single authorization center, see Scientific Atlanta Comments at 6 and PrimeTime 24 Comments at 6.

[34] GIC Coments at 29.

[35] Titan Comments at 36-38. *See also* PrimeTime 24 Comments at 6.

[36] GIC Comments at 19-26, 30; GIC Reply at 11.

[37] No commenter has made a convincing case for divesting GIC of the DBS Center. *See*, however, note 29 above.

[38] Titan Reply at 5.

[39] *See* Ortolf Letter.

[40] GIC Comments at 37; Titan Comments at 38 (endorsing the interface concept without recommending government action); News Datacom Comments at 4-5; News Datacom Reply at 2-3 (endorsing the interface concept but explicitly rejecting government action); CSC Comments at 14-16 (endorsing mandatory interface standard); DECTEC Comments at 5-6 (endorsing mandatory interface standard). *See also* Satellite Broadcasting and Communications Association (SBCA) Comments at 4-6 (noting the ability of the marketplace to respond to consumer needs in the presence of multiple technologies) and DirecTV Comments at 4 (endorsing current Commission policy of not mandating encryption standards or decoder technologies).

[41] SA Comments at 8.

[42] GIC Comments at 38-42; GIC Reply at 14-18.

[43] HBO and TCI have agreed to use a GIC-AT&T digital compression system for delivery of programming to cable and HSD subscribers. The agreement includes a requirement to license the technology to other manufacturers. Moreover, TCI and GIC will each operate authorization centers to serve programmers that utilize the technology. *See* Netlink Reply at 3; HBO Comments at 22; GIC Comments at 35; note 45 below. *See also* "TCI's Malone on the Digital TV Age," *Satellite Business News*, Jan. 13, 1993, pp. 1, 12-17, 24.

12 years.[44] Commenters generally believe that programmers will not abandon their C-band customer base. HBO offers a good example of simulcasting, with multiple analog C-band feeds, digital C-band feeds, and plans to offer digital feeds via DBS as well.[45]

21. The transition to digital transmissions is also likely to lead to the development of "hybrid" decoders that can handle analog (likely VCRS) and digital transmissions.[46] HBO suggests that the pace of the transition from analog to digital will be determined, at least in part, by C-band equipment costs and security.[47]

V. CONCLUSIONS

22. The major commenters in this proceeding do not ask for any specific Commission or Congressional action. A few commenters recommend some action, such as a mandatory decoder interface standard or mandatory access to the GIC DBS Center, but these suggestions are not well-supported and we reject them. With regard to prospects for intra-VC II competition, the complexity of the technical considerations prevents us from coming to any definitive conclusion.[48] We examined one particular attempt to compete--that of Titan-and found that programmers, the initial consumers of encryption systems--did not choose to utilize the proposed Titan system. Several commenters suggested that it is useful for the Commission to monitor and focus attention on encryption issues.[49]

23. Accordingly, IT IS ORDERED THAT this proceeding on encryption technology for satellite cable programming is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

List of Comments and Reply Comments

Comments

Channel Master
Consumer Satellite Coalition
DECTEC
DirecTv, Inc.
General Instrument Corporation
Home Box Office
Jan Gunter
Lone Star Satellite
Motion Picture Association of America
News Datacom
PrimeTime 24
Satellite Broadcasting and Communications Association
Scientific Atlanta
Thomson Consumer Electronics
Titan Satellite Systems
TV/Com International

Reply Comments

Channel Master
Consumer Satellite Coalition
Consumer Satellite Systems
DECTEC
General Instrument Corporation
Heart of America Independent Satellite Dealers
Home Box Office
Lee Hadlock, Inc.
Netlink
News Datacom
Satellite Broadcasting and Communications Association
Satellite Dealers Association
Titan Satellite Systems

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[44] See HBO Comments at 23-24 and CSS Reply at 4, 12.
[45] *See* Peter Lambert "TCI: $200 Million for Channel Explosion." *Broadcasting*, Dec. 7, 1992, pp. 4, 15.
[46] GIC Comments at 39-40; HBO Comments at 24.
[47] See the discussion of C-band equipment costs above at paras. 13-14.
[48] We note that, to the extent that a Videocipher competitor must have access to VC II technology, the number of potential rivals to GIC is small. To our knowledge, Titan is the only firm other than GIC with rights to the basic Videocipher patents.
[49] Satellite Dealers Association Reply at 7-8, SBCA Reply at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-123

In the Matter of

National Exchange Carrier Association	Transmittal Nos. 518, 527, 530

Revisions to Tariff F.C.C. No. 5

Universal Service Fund and
Lifeline Assistance Rates

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: April 20, 1993; Released: April 23, 1993

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On February 5, 1993, the Common Carrier Bureau released an order initiating an investigation into the lawfulness of the Universal Service Fund (USF) rate increase filed by the National Exchange Carrier Association, Inc. (NECA) in Transmittal Nos. 518 and 527.[1] The USF program was established by the Commission to promote affordable telephone service among high cost local exchange carriers (LECs).[2] In Transmittal 518, NECA proposed an increase of $60 million above the current six-month USF revenue requirement of $309 million. Transmittal 527 revised the increase downward to $58.5 million, reflecting corrections made by some local exchange carriers.[3] NECA's proposed USF rate was opposed by American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI), who both argued that the USF revenue requirement is artificially inflated.[4] The Bureau concluded that based on our review of the transmittals, the concerns raised by petitioners, and NECA's response, the transmittals may contain unreasonably high rates. We therefore suspended the rate for one day and imposed an accounting order. By this order, we designate the issues to be investigated and establish a pleading cycle.

II. ISSUES DESIGNATED FOR INVESTIGATION

A. Is the USF rate established in Transmittals 518 and 527 excessive due to resizing procedures employed by NECA?

2. Our initial analysis of NECA's resizing procedure reveals a methodology that may unreasonably inflate the USF revenue requirement. NECA has conducted bi-annual "resizing" of the USF since 1989,[5] in order to "true-up" the USF revenue requirement. NECA uses resizing to adjust charges to interexchange carriers to reflect corrections to LECs' historical data.[6] The current USF payout to a company may change to reflect a retrospective revision to a particular company's data. Companies which revise their costs upward receive a larger USF payout. However, these revisions generally have not resulted in NECA correcting the national average loop cost so as to change payouts for the relevant year to companies other than the revising company. LECs that do not file revisions are thus insulated from changes in their USF payments. It is our understanding that if NECA had calculated a new payout to *all* companies on an annual basis, the USF revenue requirement would have been reduced by $5.8 million for data year 1989 (used to compute 1991 USF rates), $9.3 million for data year 1990 (used to compute 1992 USF rates), and $300 thousand through December 1991.[7] The record also raised questions with respect to how NECA audits data to identify possible data errors and corrections that affect resizing to the national average loop cost.

3. To assist in our resolution of this issue, we direct NECA to provide the following information:[8]

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[1] National Exchange Carrier Association, Transmittal Nos. 518, 527, 530, Order, DA 93-136, released February 5, 1993 (Com. Car. Bur.) (*Suspension Order*). We had previously allowed unopposed portions of the transmittal to take effect on January 1, 1993, *i.e.*, the Lifeline Assistance rate, and that portion of the USF increase pertaining to the final step of an eight-year transitional phase-in of the USF expense adjustment based on the existing revenue requirement. Special Permission No. 92-995, granted December 30, 1992. (*See*, Letter from G.J. Vogt, Chief, Tariff Division, to Antonio Yanez, Executive Director, NECA, dated Dec. 30, 1992.)

[2] NECA collects the USF rate from the largest interexchange carriers (IXCs) on the basis of each IXC's total number of presubscribed lines. NECA then distributes these funds to LECs whose average loop costs exceed the national average by a certain margin.

[3] The LEC corrections were made in response to Responsible Accounting Officer Letter No. 21, Classification of Remote Central Office Equipment for Accounting Purposes, DA 92-1091 (Chief, Accounting and Audits Div. Com. Car. Bur. rel. Aug. 7, 1992), *revised*, DA 92-1225 (Sept. 8, 1992).

[4] *See Suspension Order* at paras. 3-10 for a summary of AT&T's and MCI's arguments and NECA's responses to those arguments.

[5] *See* MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, 3 FCC Rcd 5518, 5529 (1988). NECA's resizing procedure is not codified in the Commission's rules.

[6] NECA also makes quarterly and other adjustments based on quarterly revisions filed by LECs. *See* 47 C.F.R. § 36.612.

[7] *See* Letter from John A. Ricker, NECA, to Mark Uretsky, FCC (January 11, 1993). These figures are subject to further resizing or adjustments in the future. A data year is the year in which costs were incurred. 1991 costs are to be recovered in 1993 USF rates.

[8] In responding to questions in this order, NECA should include references to any relevant documents, including, but not limited to, internal procedure manuals, internal records required by those procedures, and contracts with carriers.

(a) Provide the most current version of USF data, in the same detail as data submitted to the Industry Analysis Division in NECA's October 1, 1992 filing of 1991 study results, for each of the years 1989, 1990 and 1991.[9]

(b) List and describe the types of adjustments made to the USF revenue requirement, for example, quarterly, resizing and others.

(c) Explain the conditions under which NECA recalculates the national average loop cost for purposes of resizing, separately describing those conditions resulting in changed USF payout only to revising companies from those resulting in potential changes to all companies.

(d) Provide all written internal procedures used to initiate new payouts due to resizing, for all companies based on a revision submitted by a single company.

(e) For each situation listed in (c), explain the legal authority upon which NECA relies to determine whether to recalculate the national average loop cost for resizing purposes.

(f) Describe the legal and/or practical distinctions which justify different procedures between NECA's common line pool, where revisions to historical data result in adjusted payouts for many companies, and resizing of the USF fund.

(g) For the USF data years 1984 through 1991, list the total dollar amount, if any, that the USF would have changed if the national average loop cost had been recalculated each time a company revised its data.[10] Include amounts related only to resizing. List the dollar amounts for each year, by company.[11]

(h) Describe in detail any limits on the number of years NECA keeps books of account open for purposes of resizing. Describe whether NECA distinguishes among types of companies in determining which years' data should be used for resizing, and if so, the characteristics by which companies are treated differently.

(i) Describe, both generally and in particular with respect to allocations to Category 4.13, how NECA detects errors made by reporting companies and what actions it takes to correct those errors. Describe the obligation NECA's procedures and the Commission's Rules create for companies to report to NECA accounting errors and corrections thereto, for companies that receive USF funds and those that do not. Explain any effect on the USF revenue requirement caused by such errors and their correction, as reflected in Transmittals 518 and 527.

B. If the Bureau requires NECA to revise its procedures with respect to the national average loop cost as a result of this investigation, should this ruling be applied retroactively, and if so, how far back?

III. PROCEDURAL MATTERS

4. This investigation will be conducted as a notice and comment proceeding. CC Docket No. 93-123 has been assigned for this purpose. NECA shall file its direct case no later than May 26, 1993. The direct case must present NECA's position with respect to the issues described in this Order. Pleadings responding to the direct case may be filed no later than June 23, 1993, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." NECA may file a "Rebuttal" to oppositions or comments no later than July 7, 1993.

5. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, ITS, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy of each pleading must be delivered to the Tariff division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

6. This is a non-restricted notice and comment proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

7. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

8. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or record-keeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. Section 3502(4)(A).

IV. ORDERING CLAUSES

9. IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. Sections 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, that the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

10. IT IS FURTHER ORDERED that National Exchange Carriers Association shall include a response to each item of information requested in Section II, *supra*, in its direct case, and that the material to be submitted on floppy disk format in response to information request (a), must be filed at the Tariff Division, Tariff Review Branch, Room 514, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED that this Order is effective upon adoption.

[9] Please submit this information, in Lotus 1-2-3, Release 3.1 format, on either 5-and-1/4 or 3/and-1/2 inch high density floppy disk.

[10] Please provide this information in the chart format contained in the Letter from John A. Ricker, NECA, to Mark Uretsky, FCC (January 11, 1993).

[11] In addition to the paper copies, please submit one copy of this chart in Lotus 1-2-3, as described in note 9, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

B.F. Investments, Inc. File No. 1417-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on the F-group
channels at Johnson City, Tennessee

ORDER ON RECONSIDERATION

Adopted: April 22, 1993; Released: April 29, 1993

By the Chief, Domestic Facilities Division:

1. *Introduction.* B.F. Investments, Inc. (Investments) filed a petition for reconsideration of the dismissal by the Domestic Facilities Division (Division) on delegated authority of its application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Johnson City, Tennessee, and requested reinstatement of its application.

2. *Background.* As the result of a Commission lottery, the above-referenced application was selected for qualification review. Subsequently, Division staff initiated qualification review of the application, pursuant to 47 C.F.R. Sec. 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Investments was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of its application would serve the public interest. Investments was notified by letter of these deficiencies and provided an opportunity to cure them within thirty (30) days of the date of the letter.[1] Investments was also advised in the deficiency letter that failure to file the requested information within thirty days could result in the dismissal of its application.

3. Investments provided some, but not all, of the requested information. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Rules, the Division dismissed Investments' application for failure to comply completely in a timely manner with the Division's request for information. After acknowledging that it had failed to submit all of the requested information, Investments states, on reconsideration, that its application should be reinstated because: (1) its consultant, a certified public accountant, "has been extraordinarily busy during the tax season;" (2) it has been negotiating "with two different national coventure groups;" and (3) after dismissal, it submitted an option agreement and an ITFS interference analysis.

4. *Discussion.* As of the date of the Division's dismissal action, Investments had submitted some, but not all, of the information necessary for evaluation of its qualifications to be an MMDS licensee. For example, Investments had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to the lottery. However, once the lottery is held, a fully-executed lease, lease option agreement, or other concrete evidence of site availability must be submitted.[3] *Video/Multipoint*, 6 FCC Rcd 5125, 5126 (Comm. Car. Bur. 1991).

5. Also, Investments failed to comply with the Division's request to submit the Section 21.902(i) ITFS interference analysis for its application. At the time of the dismissal, Section 21.902(i) required MMDS applicants to submit, prior to receiving construction authorization, and at such time as the Commission requested it, an analysis demonstrating that the proposed MMDS facilities would not cause harmful interference to existing cochannel or adjacent-channel ITFS stations within 50 miles of the MMDS station's proposed transmitter site, or alternatively, a consent statement from the ITFS licensee. By the express language of this rule, an MMDS applicant must submit an ITFS interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by a specified date, Investments failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988). In addition, Investments failed to submit FAA program compliance information prior to dismissal.

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[1] The deficiencies cited were the absence of: (1) a public interest statement, pursuant to 47 C.F.R. Sec. 21.13(a)(4); (2) information for Federal Aviation Administration (FAA) air navigation hazard program compliance, as required by 47 C.F.R. Secs. 17.4(f) and 21.15(d); (3) a financial certification, pursuant to 47 C.F.R. Sec. 21.17; (4) a programmer non-affiliation statement, pursuant to 47 C.F.R. Sec. 21.900; (5) a tariff exhibit, as required by Item 29 of FCC Form 435; (6) emergency repair procedures and maintenance program, pursuant to 47 C.F.R. Sec. 21.15(e); (7) answers to questions on pages 5, 6 and 7 of FCC Form 435; (8) the interference showing required by 47 C.F.R. Sec. 21.901(d)(7); (9) an analysis demonstrating a lack of harmful interference to Instructional Television Fixed Service (ITFS) licensees, pursuant to 47 C.F.R. Sec. 21.902(i); (10) a lease or lease option agreement, pursuant to 47 C.F.R. Sec. 21.15(a); and (11) a current qualification report, FCC Form 430.

[2] Even if Investments was not required to comply with the requirements of Section 21.15(a), it was required, pursuant to Sec. 21.13(c), to submit a lease or lease option agreement after the Division directed it to do so. Section 21.13(a) provides, *inter alia*,: "In addition to the general application requirements of Secs. 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact: ... (2) As the Commission, at any time after the filing of an application ... may require from any applicant ... to enable it to determine whether a radio authorization should be granted...."

[3] *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987) (Where there is a lottery "it shall be sufficient if the application adequately demonstrates reasonable assurance of the availability of the site. A license will not be granted, however, until concrete evidence of site availability is submitted." *Id.*).

6. Investments had a duty to submit curative amendments to its application within thirty days of the Division's written request, or to obtain an extension of time. *Vision-Aire*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for more than four (4) months substantially impeded the expeditious offering of MMDS at Johnson City. Also, Investments' failure to respond in a timely manner to the Division's request for information hindered the discharge of the Commission's statutorily-imposed duties under Title III of the Communication's Act. *By Direction of the Commission Letter to US West*, 60 Rad. Reg. 2d 8, 9 (1985). At the time of the dismissal, Investments had not provided the required ITFS interference analysis, information necessary for compliance with the FAA air navigation hazard program, and the required lease or lease option agreement. The Division was not in a position, therefore, to complete evaluation of Investments' MMDS station proposal and its qualifications to be an MMDS licensee. *Multi-Point Television Distributors*, 5 FCC Rcd 519, 520 (Comm. Car. Bur. 1990).

7. *Conclusion and Ordering Clause*. Having carefully considered the arguments and evidence presented, we find that the dismissal of this application for failure to comply with the Division's request for information was proper, reconsideration of the action is not warranted, and reinstatement of the application is not justified.[4] Accordingly, IT IS ORDERED that the petition for reconsideration filed by B.F. Investments, Inc. regarding the above-referenced MMDS application IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. §0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[4] In the same document in which it requested reconsideration, Investments also requested a stay. Due to our disposition of Investments' reconsideration petition, we hereby dismiss its request for stay as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TEXAS WIRED MUSIC, INC. File No. 52552-CM-P-92

Application for relocation of
Station WJM99, MDS Channel 1
in Austin, TX.

and

CABLEMAXX, INC. File Nos. 50057-CM-P-89
and 50064-CM-L-90

Modification of Station
License WLW975, MDS Channel 2A
in Austin, TX.

MEMORANDUM OPINION AND ORDER

Adopted: April 22, 1993; Released: April 28, 1993

By the Chief, Domestic Facilities Division:

1. Multipoint Distribution Service (MDS) station WJM66, licensed to Texas Wired Music, Inc. (TWM), has operated on Channel 1 in the Austin, TX area since August, 1977. MDS station WLW975, licensed to CableMaxx, Inc. (CableMaxx), has operated on Channel 2A in the same area since November, 1989.[1] The stations are not colocated, but are six miles apart. When the original owner of MDS station WLW975 applied for its license, TWM filed a petition to deny alleging harmful adjacent channel interference to MDS station WJM66. The Commission dismissed the petition to deny, and granted a license to CableMaxx's predecessor, subject to certain technical specifications: (1) that the operation of the Channel 2A facility would not cause interference to identified subscribers of station WJM66, (2) that station WLW975 would fully cooperate to resolve any interference problems that may arise to station WJM66, and (3) that station WLW975 would unequivocally accept any interference to its own facility resulting from the operation of station WJM66. *Austin Movie and Sports Cable, Inc.*, 4 FCC Rcd 6174 (1989) (hereinafter referred to as the *Austin Order*).

2. On December 24, 1991, TWM filed a modification application to relocate station WJM66 to a new site 2.5 miles from station WLW975. CableMaxx, the present owner of MDS station WLW975, filed an opposition requesting that the Commission either deny the modification application of TWM or, in the alternative, remove the three license conditions imposed on station WLW975 in the *Austin Order*. CableMaxx contends that the relocation of station WJM66 significantly changes the original circumstances under which the conditions were imposed.

3. Subsequent to the filing of CableMaxx's petition to deny, the parties met and engaged in discussions to resolve this matter. As a result of these discussions, CableMaxx and TWM filed a joint petition on August 6, 1992, requesting that the Commission (1) grant the modification application of TWM and (2) remove the special conditions imposed on MDS station WLW975. Along with the petition, the parties filed an "Interference Agreement" in which they agree, among other things, to fully cooperate with one another to eliminate harmful interference experienced at any receive site of either Channel 1 or Channel 2A. They further agree that it shall be the responsibility of the party receiving the interference to bear the cost of any changes necessary to eliminate the interference, whether those changes are made to the transmitting facility or to the receive facilities, provided that the station transmitting the undesired signal is operating within the FCC parameters. If the transmitting station is not operating within FCC parameters, however, it shall be the responsibility of the transmitting station party to correct any nonconforming operation and to bear the associated costs.

4. The agreement states that it was intended to cover interference problems related to MDS station WLW975 as authorized on the date of the agreement and to MDS station WJM66 as proposed in the modification application on the date of the agreement. If either party in the future modifies its facilities to incorporate a change classified as major by the FCC or which otherwise causes harmful interference not previously existent, then the agreement will terminate, unless the parties agree otherwise in writing. Finally, as part of the agreement, CableMaxx agrees to withdraw its opposition to TWM's modification application, if the Commission grants the joint petition and removes the special conditions on the license of MDS station WLW975.

5. The Commission has encouraged and will continue to encourage parties to enter into voluntary agreements to resolve adjacent-channel interference problems. *In the Matter of Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 6 FCC Rcd 6792, 6796 (1991). In the instant case, we find that the agreement between TWM and CableMaxx is consistent with this general Commission policy. In addition, the terms of the agreement appear to be reasonable and consistent with our policies regarding the obligation imposed on applicants and licensees who "shall make exceptional efforts to avoid harmful interference to other users and to avoid blocking potential adjacent channel use in the same city ... and are expected to cooperate fully in attempting to resolve problems of potential interference ...." 47 C.F.R. § 21.902(a). "The duty imposed by Section 21.902(a) is an ongoing one applicable to MDS applicants and licensees alike. Both TWM and ASMC [as well as its assignee Cablemaxx] are expected to

[1] The original conditional license for MDS station WLW975 was granted to Austin Movie and Sports Cable, Inc. by Commission action on August 8, 1989. *Austin Movie and Sports Cable, Inc.*, 4 FCC Rcd 6174 (1989). With Commission consent, it was assigned to CableMaxx, Inc. on November 3, 1989.

continue to act in good faith and diligence as contemplated by this rule section so that services provided to the public are maximized." (*Austin Order*, 4 FCC Rcd at 6175). We, therefore, find that it would be in the public interest to grant the joint petition of TWM and CableMaxx.

ACCORDINGLY, IT IS ORDERED, That the Joint Petition filed by TWM and CableMaxx on August 26, 1992, IS GRANTED; that the Interference Agreement between TWM and CableMaxx IS APPROVED; that the special conditions on MDS station license WLW975 ARE REMOVED; that the "petition to deny or for alternative relief" filed by CableMaxx IS DISMISSED; that the modification application of TWM (File No. 52552-CM-P-92) IS GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-106

In re Applications of

INTERMART BROADCASTING GULF COAST, INC.	File No. BPH-880224MN
SOUTHWEST FLORIDA FM BROADCASTING, LTD.	File No. BPH-880303MG
Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a KIGHT BROADCASTING LIMITED PARTNERSHIP	File No. BPH-880303MH
PALM TREE FM LIMITED PARTNERSHIP	File No. BPH-880303MQ

For Construction Permit for
New FM Station, Channel 249A,
Punta Rassa, Florida

Appearances

Gary S. Smithwick, Esq. and *J. Daniel Gillick, Esq.*, on behalf of InterMart Broadcasting Gulf Coast, Inc.; *Thomas J. Keller, Esq.* and *Jacqueline R. Kinney, Esq.*, on behalf of Southwest Florida FM Broadcasting, Ltd.; *Dennis F. Begley, Esq., Matthew H. McCormick, Esq.*, and *Andrew S. Kersting, Esq.*, on behalf of Kight Broadcasting Limited Partnership; *Stephen Diaz Gavin, Esq.* on behalf of Palm Tree FM Limited Partnership.

DECISION

Adopted: April 9, 1993; Released: April 30, 1993

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

Board Chairman MARINO:

1. This is a comparative proceeding for a new FM broadcast station at Punta Rassa, Florida, governed by the criteria set forth in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 395 (1965). Following a trial-type hearing, Administrative Law Judge Joseph Chachkin (ALJ) awarded both Kight Broadcasting Limited Partnership (Kight) and Southwest Florida FM Broadcasting Ltd. (Southwest) one hundred percent quantitative integration credit based on their respective proposals to integrate all of their voting ownership into management-level positions at the proposed station. *See Initial Decision*, 7 FCC Rcd 83, 103 ¶ ¶ 171-174 (I.D. 1992) (I.D.). The ALJ selected Kight over Southwest because of Kight's superior qualitative integration attributes. *Id.* at 103-104 ¶ ¶ 175-176. InterMart Broadcasting Gulf Coast, Inc. (InterMart), which proposed no (0%) integration and received a moderate diversification demerit, finished a distant third. *Id.* at ¶ ¶ 168-169. The ALJ disqualified the fourth applicant, Palm Tree FM Limited Partnership (Palm Tree). *Id.* at 101-102 ¶ ¶ 159-164.

2. All four applicants have filed exceptions and reply briefs to the I.D. Oral argument was held on June 10, 1992. The decisional questions presented are: (a) whether, as claimed by InterMart, *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992), requires that this case be held in abeyance and possibly remanded in the future; (b) whether Palm Tree should have been disqualified on financial qualifications and related misrepresentation or lack of candor issues and, thus, excluded from comparative consideration; and (c) whether Kight's quantitative integration credit (an undisputed basis for a grant since Southwest acknowledges Kight to be the superior *qualitative* applicant, Tr. 1310) should have been diminished to less than one hundred percent.

A. INTERMART BROADCASTING GULF COAST, INC

3. InterMart proposed no integration and received a diversification demerit premised on its principal's significant ownership interests in other broadcast media: two FM stations in Florida; one in Georgia; and one in Nevada. I.D., 7 FCC Rcd at 83-84 ¶ ¶ 7-8. InterMart did not challenge either of these decisive comparative factors at the hearing before the ALJ. Now, in exceptions before the Board, InterMart argues, for the first time, that the court's *Bechtel* decision, *supra*, "calls into question the underpinnings of the 1965 *Policy Statement*. " In *Bechtel*, the court remanded a comparative broadcast proceeding to the Commission to consider an argument that it no longer use integration as a criterion for selecting among mutually exclusive applicants for new broadcast facilities. The case subsequently precipitated a reexamination of the Commission's comparative criteria, *see Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992). In light of *Bechtel*, InterMart contends (Br. pp. 3-8):

> A. The "FCC-Integration" proposals of the applicants should not be employed exclusively to determine the likelihood of effectuation of program service in the public interest.
>
> B. InterMart should not be assessed a demerit for its ownership and operation of other broadcast stations.

It urges the Board to await Commission clarification of the comparative criteria and then to remand with instructions not to penalize it for its ownership of broadcast stations. In essence, InterMart seeks a preference for its history of starting up stations and urges that a future remand "determine whether the broadcast experience of any of the principals of any of the applicants is more predictive of the likelihood that the applicant will actually construct the station and place it on the air." InterMart Exceptions at 9.

4. Palm Tree responds that, unlike the applicant in *Bechtel*, who litigated the question at every stage of the hearing from prehearing to Commission review, InterMart "elected not to contest the Commission licensing scheme,"

either prior to or during the hearing, and its arguments therefore, are foreclosed by the well-established principle that a broadcast applicant is "not entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been treated fairly." Palm Tree Reply Exceptions at 3-5, quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 27 (D.C. Cir. 1941). *See also Spanish International Broadcasting Co. v. FCC*, 385 F.2d 615 (D.C. Cir. 1967). Kight similarly argues that InterMart did not launch any sort of [*Bechtel*] attack on the comparative criteria below," and therefore "waived these arguments." Kight Reply Exceptions at 5.

5. The Board will not grant InterMart's request because, as InterMart itself presupposes (Br. at n.3), the Board is without jurisdiction to modify the 1965 *Policy Statement*, or to determine the impact of the waiver argument and the nature of relief, if any, to which InterMart is entitled because of the *Bechtel* decision as subsequently amplified by *Flagstaff Broadcasting Foundations v. FCC*, No. 90-1587 (D.C. Cir. December 4, 1992). *See Goodlettsville Broadcasting Co., Inc.*, 8 FCC Rcd 57, 58 ¶ ¶ 6-7 (Rev. Bd. 1992) (challenges to the integration and diversification criteria beyond Board's reviewing authority); *see also Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942, 2944 ¶ 10 (Rev. Bd. 1992) (Board lacks jurisdiction to consider novel *Bechtel* type issues), *review denied*, 7 FCC Rcd 7996 (1992). InterMart notes that it is merely trying to "save this objection by exception for consideration by later reviewing authorities." InterMart Exceptions at 3, n.3. In any event, the Commission has explicitly held that the criteria of the *Policy Statement* are to be applied to pending applications and that the reexamination rulemaking does not warrant holding pending cases in abeyance. *See Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992), *modified*, FCC 93-115, released March 10, 1993.

B. PALM TREE FM LIMITED PARTNERSHIP

6. The ALJ resolved a financial qualifications issue against Palm Tree based on more than fifty paragraphs of findings. *I.D.*, 7 FCC Rcd at 95-97 ¶ ¶ 103-137. In addition to reaching this resolution, he held that "[e]ven if Palm Tree were presumed to have acted in good faith in submission of its original financial certification, Palm Tree's subsequent lack of candor and misrepresentations regarding its financial qualifications cannot be overlooked." *Id.* at 102 ¶ 165. The misrepresentation holding provided an independent ground for Palm Tree's disqualification. *Id.* at ¶ 167. Palm Tree devotes the bulk of its exceptions to the ALJ's finding that it is not financially qualified, correctly relying on precedent that there is no need for any conclusion about the more subjective misrepresentations issue if it does not prevail on the financial qualifications issue. Exceptions at 6-15, 16 n.28. *See generally Rebecca L. Boedker*, 6 FCC Rcd 2557, 2559 n.2 (1991).

7. The Commission's financial standard requires that applicants certifying they are financially qualified must have reasonable assurance of sufficient net liquid assets on hand or sufficient funds available from committed sources to construct and operate the proposed station for three months without revenues. *See generally Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989) (subsequent history omitted). Moreover, the applicant must engage "in serious and reasonable efforts to ascertain predictable construction and operations costs" before certifying that it is financially qualified. *Id.* at 5519; *see also A.P. Walter, Jr.*, 6 FCC Rcd 875, 877 ¶ 10 (Rev. Bd. 1991) ("Inherent in [the financial standard] is that an applicant determine what its costs will be and then decide whether it has adequate funds to meet those costs").

8. Here, the ALJ found that Palm Tree's original June 1, 1988 cost estimates were $200,000 to $220,000, I.D., 7 FCC Rcd at 95 ¶ 106, and that it relied on a May 5, 1988 Bank of New England letter for $400,000. *Id.* at 97 ¶ 117. Palm Tree's original financial showing was found to be defective in three substantial areas. The first and "the most significant defect" pertained to Palm Tree's original cost estimates of $200,000 to $220,000. *Id.* at 95 ¶ 106. These figures included "an estimate of $40,000 for a guyed tower," *id.* at 101-102 ¶ 161, whereas Palm Tree's contemporaneous application revealed that a much more expensive "self-supporting tower was proposed," whose cost was later acknowledged by Palm Tree to be $100,000. *Id.* at 95 ¶ 107. A second cost defect found by the ALJ was Palm Tree's failure to include any repayment cost for the bank loan. *Id.* at 101-102 ¶ 161. The third defect pertained to the availability of the $400,000 bank loan, which the ALJ found was the product of a brief ten minute telephone conversation between one of Palm Tree's limited partners and the then-senior vice-president of the bank. *Id.* at 97, 102 ¶ ¶ 118, 162. He concluded that Palm Tree failed to satisfy its burden that the loan was available because Commission precedent requires that the lender consider the individual qualifications of the prospective borrower, and that the issuance of the letter is consistent with the normal banking practices. *See, e.g., Christina Communications*, 2 FCC Rcd 1971, 1974 ¶ 25 (1987); *Global Information Technologies, Inc.*, 5 FCC Rcd 3385 (Rev. Bd. 1990), and *Scioto Broadcasters Limited Partnership*, 5 FCC Rcd 5517, 5160 (Rev. Bd. 1990). Palm Tree also failed to show that the tentative terms of the loan were identified, and were satisfactory to both the borrower and lender. I.D., 7 FCC Rcd at 97, 102 ¶ ¶ 118, 162. In essence, Palm Tree's bank letter was deemed to be a mere accommodation for the applicant. *Id.*

9. The ALJ went on to find that even if Palm Tree had demonstrated that it was initially qualified, the evidence demonstrated that it is currently financially unqualified. *Id.* at 102 ¶ 163. He found:

> Palm Tree now estimates that its total cost for construction and operation for the first three months is $528,382. Even assuming the availability of the $400,000 bank loan, Palm Tree's funds fall far short of its projected needs. Moreover, Palm Tree's budget substantially understates its costs. The budget estimate still has no provision for payments on the bank loan during the period of construction or the first three months of operation. In addition, Palm Tree has allocated $245,000 for its proposed transmitter site. The current cost estimate presumes that Palm Tree can rely upon the fair market value of the proposed transmitter site, instead of the owner's stated price of $650,000 (later reduced to $550,000). However, no Commission precedent endorses such a methodology. Commission precedent indicates that a site owner unilaterally determines whether a site is available and under what terms and it is immaterial whether an applicant believes that a site owner's conditions for assurance of a site are unreasonable. *See Kaldor Communications, Inc.*, 55 RR 2d 567 (Rev. Bd. 1984); *South Florida Broadcasting Co., Inc.*, 57 RR 2d 495, 500 (Rev. Bd. 1984); *Dutchess Communications Corp.*, 58 RR 2d 381, 389 (Rev. Bd. 1985). Thus, even

> putting the bank repayment question aside, the actual cost of construction and operating Palm Tree's station is in the neighborhood of $830,000.

Id. After the evidentiary hearing on the financial issue had been held, and the record was closed, Palm Tree sought leave to reopen the record to further modify its financial showing with a new $850,000 loan letter. The ALJ denied the motion for want of "good cause." *Memorandum Opinion and Order*, FCC 91M-753, released February 26, 1991.

10. Palm Tree now argues: (1) that the ALJ erred in holding that it is not currently financially qualified; and (2) that, in any event, it should have been permitted to amend its financial showing. With respect to the ALJ's criticism of its current financial qualifications, *i.e.*, that the applicant could not unilaterally reduce the owner's sale price from $650,000 to $245,000, it argues: "When a site owner or his designated representative indicates that the proposed site is available and further indicates an intention to negotiate for sale of the proposed site, reasonable assurance is established.... [No] Commission precedent establishes that an applicant cannot reasonably estimate the cost to make an acquisition in the absence of a specific price." Palm Tree Exceptions at 8-9. It argues that its principal, Ms. Karas, "reasonably recalculated" a purchase price of $200,000. *Id.*

11. Its arguments are not supported by controlling precedent; nor do they have any bearing to the facts. At the outset, the ALJ correctly held that when certifying to its financial qualifications, an applicant proposing a specific tower site cannot simply ignore the price demanded by the site owner and unilaterally replace it with one the applicant deems more reasonable. *Cf. South Florida, supra.* Here, Ms. Karas received a letter dated May 30, 1990 from the real estate broker representing the owners of the proposed transmitter site. I.D., 7 FCC Rcd at 96 ¶ 115. The letter indicated the property was currently listed for $650,000 and it made no reference to any deferred payment terms. *Id.* The ALJ added:

> In her written testimony, Ms. Karas states that in consultation with communications counsel she "recalculated the cost estimate for Palm Tree if the transmitter site were to be purchased rather than leased." Palm Tree Ex. 8, p. 3. She further stated:
>
> > In determining a purchase price for the transmitter site, I accounted for the fact that although the property was currently listed for $650,000, it had been sold in January 1984 for $170,000, and in July 1988, it had sold for only $180,000, a $10,000 gain in more than four years. Thus, I recalculated a price to purchase the property of approximately $200,000 [sic].
>
> *Id.* Nothing in the record indicated that the [owners] were ever willing to accept a purchase price of $200,000. Palm Tree Ex. 8, p. 4.

Id. In an analogous case where an applicant assumed that he could lease certain radio facilities at a cheaper price than the owner proposed to sell, we held:

> Reasonable assurance does not require a legally binding agreement; however, there must be some meeting of the minds of the involved parties. *See Progressive Communications, Inc.*, 3 FCC Rcd 5758 (Rev. Bd. 1988), and numerous cases cited at 5759-5760. For example, if an applicant is proposing to lease or purchase its radio facilities and the owner has specified a certain price, the applicant may not unilaterally assume a different price for those facilities. *See South Florida Broadcasting Co.*, 99 FCC 2d 840 (Rev. Bd. 1984), and *see also Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985).

Bennett Gilbert Gaines, FCC 93R-3, released March 3, 1993, ¶ 22. In sum, the ALJ's finding that Palm Tree is not currently financially qualified is based on a substantial factual record and past and recent precedent. We turn to the question of whether Palm Tree demonstrated "good cause" for its post-hearing amendment increasing its loan letter from $400,000 to $850,000.

12. The elements of good cause are: (1) that the applicant acted with due diligence; (2) that the proposed amendment was not required by the voluntary act of the applicant; (3) that no modification or addition of issues or parties would be necessitated; (4) that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate an additional hearing; (5) that the other parties will not be unfairly prejudiced; and (6) that the applicant will not gain a competitive advantage. *See Royce International Broadcasting Co. v. FCC*, 820 F.2d 1332, 1335 (D.C. Cir. 1987); *see also Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). In *Aspen FM*, 6 FCC Rcd 1602, 1603 ¶ 13 (1991), the Commission stressed that a "critical ingredient of good cause" is a showing that the applicant had reasonable assurance of financing at the time of certification. It has been "increasingly stringent in enforcing this requirement." *See Georgia Public, supra*, 7 FCC Rcd at 7998-7999 at ¶ 4; *see also Pontchartrain Broadcasting Co.*, FCC 93-156, released March 31, 1993.

13. On February 1, 1991, Palm Tree claimed that good cause existed for substituting the new $850,000 loan letter for the Bank of New England $400,000 letter because the Bank of New England had been taken over by the Federal Deposit Insurance Corporation. The ALJ, however, rejected that argument, noting that the bank takeover was recent whereas the applicant had been on notice as far back as May 1990 that its continued reliance on the source and amount of its projected funds was suspect. *Memorandum Opinion and Order*, FCC 91M-753, released February 26, 1991. The ALJ found that Palm Tree's purported reason was nothing more than a convenient excuse to mask its tardiness. He also noticed that the proposed amendment was silent as to the reason for the more than two-fold increase in dollar amount. *Id.* In holding good cause was lacking, the ALJ reasoned that Palm Tree had not been diligent in seeking the new and increased funding and that the amendment was "disruptive" because it was filed six weeks after the record had been closed, and one day before proposed findings of fact were due. He further observed that the amendment would, at minimum, require additional findings and possibly additional hearings. Based on the foregoing, we perceive no error in his ruling. Accordingly, we affirm the ALJ's ruling set out in full in paras. 4-6 of his *Memorandum Opinion and Order, supra*, as completely consistent with past precedent.

14. In sum, at the hearing Palm Tree's June 1, 1988 financial estimates were found to be deficient in several important respects. It was also established at the hearing that on May 30, 1990, a letter put Palm Tree on notice that the cost of its proposed transmitter site was $650,000. Palm Tree did not seek additional financial resources at that time. Some seven months later, and after the hearing, it sought leave to amend its financial showing, increasing its previous loan letter from $400,000 to $850,000. The denial of this amendment for lack of good cause is fully supported by the Commission's decision in *Aspen, supra*, and subsequent cases. Finally, we note, as did the ALJ, that if basically qualified and entitled to comparative consideration, "Palm Tree's qualitative enhancement is inferior to that of Kight Broadcasting." I.D., 7 FCC Rcd at 103-104 ¶ 175 n.41.

C. KIGHT BROADCASTING LIMITED PARTNERSHIP

15. Kight Broadcasting is a limited partnership composed of two general partners, Byron Kight and Maria Giglia Martinez Johnson, and one limited partner, Phillip Memoli. I.D., 7 FCC Rcd at 87 ¶ 37. Byron Kight has a forty percent equity interest in the applicant and Johnson twenty percent. *Id.* Each general partner will have a fifty percent voting interest. *Id.* In its original application, Kight noted that: "In the event of a dispute between the general [partners] the vote of Byron Douglas Kight shall control." FCC Form 301, Section II, ¶ 5 note; *see also* I.D., 7 FCC Rcd at 87 ¶ 38. Mr. Kight, who has more than 20 years of broadcast experience, will work on a full-time basis as the station's general manager. Johnson, who in addition to a full-time school board position works as a part-time Director of Community Affairs for Station WBBH-TV, Fort Myers, Florida, will serve as the proposed station's full-time News and Public Affairs Director. *Id.* at 89 ¶ ¶ 55-56. Both she and Byron Kight worked together at WBBH-TV from 1972 until 1986, when he left the station. *Id.* at 89-90 ¶ ¶ 52, 61. As noted in para. 1, above, Kight received one hundred percent quantitative integration credit and was selected over Southwest because Kight's principals are long-term service area residents with extensive civic activities and past broadcast experience. *Id.* at 104 ¶ 176. Johnson is also Hispanic, and the applicant thus received fifty percent minority enhancement. Southwest, the closest competitor, agrees that Kight is the comparative winner unless the Review Board reduces Kight's quantitative integration credit. Tr. of O.A. 1310.

16. In its exceptions, InterMart baldly asserts "that Kight's organizational structure is a sham and that Ms. Johnson serves as a front in order to gain female and minority enhancement credits." Br. at 9. It further maintains that "Johnson has displayed no control, extremely limited involvement and little knowledge of the affairs of Kight." *Id.* at 10. It contends that a review of the totality of the record in accordance with *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 (1990), establishes that Kight should receive no integration credit, but does not enumerate any specifics to support its assertions. Southwest, on the other hand, advances a narrower claim that "Kight should be awarded no more than 20 percent integration credit for Ms. Johnson's proposed participation, which represents her equity interest in Kight," arguing that she has not acted as a *bona fides* general partner, citing as support *Imagists*, 6 FCC Rcd 7440 (Rev. Bd.). Southwest Exceptions at 9-10. It charges that the ALJ minimized that Mr. Kight was the initiator and prime mover of the application and that Ms. Johnson will report to Mr. Kight who, it argues, has the ultimate decision-making authority. *Id.* at 9. Southwest further argues that the ALJ erred in concluding that "Johnson's proposed role at the station will be truly managerial," and that in resolving this matter the ALJ failed to address the disparity between the salaries of Ms. Johnson, allegedly $1800 a month for the first three months, and Mr. Kight, $9,600 per month for the same period. *Id.* at 9-10. After oral argument, Southwest corrected the latter figure to $3,200, but continued to adhere to its previous argument.

17. At the outset, we agree with Kight, and the ALJ, that Johnson is "not a 'front' recruited at the last minute simply on the basis of her gender and race." Kight Reply Br. at 2. As note in para. 15 above, she is currently the part-time Director of Community Affairs for Station WBBH-TV, Fort Myers, Florida, and has worked with Byron Kight for more than a decade. She also anchored a five-minute Spanish weekday newscast from 1973-1986, produced and anchored a thirty-minute daily program from 1973-1988. I.D., 7 FCC Rcd 90 ¶ 61. Byron Kight testified that he asked Johnson to join the application because she would make "a strong addition" to the proposal because she is a long-time local resident, a broadcaster, and a minority. *Id.* at 87 ¶ 40. Additionally, her past broadcast experience convinced him that she would be able to run a news operation and handle public affairs, complementing gaps in Kight's own broadcast experience. *Id.* Thus, the circumstances of this case do not fall within the prototypical allegations of "fronts," where female or minority general partners, with little or no broadcast experience, are entrusted with one hundred percent control of the proposed stations by limited partners who barely knew them or their qualifications. *See, e.g., Poughkeepsie Broadcast Limited*, 6 FCC Rcd 2497, 2398 (1991); *Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8159 (Rev. Bd. 1989), *modified*, 5 FCC Rcd 5610 (1990). *Imagist*, cited by Southwest, was just another "prototypical sham of the type found" in the foregoing cases. 6 FCC Rcd at 7449 ¶ 42.

18. Nor do the specific objections that Byron Kight was the primary mover of the application or that Johnson will defer to him as general manager undermine Johnson's integration proposal. Kight accurately responds that "there is no prohibition against a majority principal leading the way in prosecuting the application, provided the other active principals will play true and actual roles in management." Reply Br. at 5. *See Liberty Productions, A Limited Partnership*, 7 FCC Rcd 7581, 7585 ¶ 33 (1992) ("no requirement that owner proposing to be integrated into station management must participate in prosecuting the application": factor significant only when evaluating two-tiered structures to determine whether purported active owner will defer to nominally passive owner). *See also Victorson Group*, 6 FCC 2d 1697, 1702 n.3 (Rev. Bd. 1991); *accord, e.g., McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7272 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2347 (1991); *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3667 (Rev. Bd. 1987). Nor will the Commission discredit an integration proposal merely because the general manager has the ultimate decision-making authority over the station. *See Virgil L. Pearman*, 5 FCC Rcd 5697, 5699 ¶ 11 (Rev. Bd. 1990) (integration proposal of station manager credited even though ultimate responsibility rested on general manager); *Rancho Mirage Radio, A General Partnership*, 7 FCC Rcd 480, 482 §¶ 11-13 (Rev. Bd. 1992), *review denied*, 7 FCC Rcd 4337 (1992). Johnson's position of News and

Public Affairs Director is recognized by the Commission's *Policy Statement* as managerial, 1 FCC 2d at 395, and there is no evidence that Johnson will not honor her proposal. Johnson made, when requested, her required contributions under the partnership agreement of some $2,000 for her equity interest, and she is required to personally guarantee the applicant's bank letter. I.D., 7 FCC Rcd at 88 ¶ ¶ 42-43.

19. After reviewing the totality of the record evidence, the ALJ concluded that:

> Johnson has actively participated in the formation of Kight Broadcasting and the preparation and prosecution of its application. Also, she has made a meaningful financial contribution to the applicant. Further, she will enhance the operation of the station because of her professional background and experience in public affairs.... Johnson will be responsible for supervising all aspects of the station's news and public affairs activities. She will hire, supervise, and train a staff of at least four individuals who will be working directly under her at the proposed station. *See* Finding 55. It is, therefore, clear that Johnson will occupy a meaningful managerial role and is entitled to integration credit.

Id. 7 FCC Rcd at 103 ¶ 174. Our own review of Ms. Johnson's testimony confirms the accuracy of the ALJ's findings that she was familiar with the proposal, that her proposed job is one she is well qualified for, and that she was kept fully informed by Kight. She helped prepare the EEO section (Tr. 237) and a study of the profitability of the market (Tr. 246-247); and assisted in putting together a budget, staffing and equipment plan, and estimated the number of staff and salary for the proposed station. Tr. 299-300. She has known Kight for 15 years. (Tr. 301). Finally, the parties have not shown that the salary difference of $3,200 for general manager and $1,800 for news and public affairs director is inconsistent with industry practice.

20. In sum, this is not a case where experienced limited partners used inexperienced minorities or females as fronts, entrusting them with complete control of the proposed station. From the outset, Byron Kight was declared to be, and was, the controlling partner and proposed general manager. He personally selected Johnson for a more limited managerial position at the station, believing she was fully qualified for that position because of her past broadcast experience. Although Kight played the major role in the preparation and prosecution of the application, we agree with the ALJ that Ms. Johnson participated and was familiar with all aspects of their proposal. The record supports his decision to fully credit her integration proposal which we hereby affirm. *Cf. Scottsdale Talking Machine*, 6 FCC Rcd 7539 (Rev. Bd. 1991), *review denied*, 7 FCC Rcd 4422 (1992).

21. ACCORDINGLY, IT IS ORDERED, That the Motion to Hold in Abeyance filed February 10, 1992 by InterMart Broadcasting Gulf Coast, Inc. IS DENIED; and that its Petitions for Leave to Amend filed April 24, 1992; July 29, 1992; September 25, 1992; November 13, 1992; January 4, 1993; and March 10, 1993, ARE GRANTED, pursuant to Section 1.65 of the Commission's Rules, for reporting purposes only.

22. IT IS FURTHER ORDERED, That the application of Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a Kight Broadcasting Limited Partnership (File No. BPH-880303MH) for a new FM station on Channel 249A, in Punta Rassa, Florida, IS GRANTED; and that the applications of InterMart Broadcasting Gulf Coast, Inc. (File No. BPH-880224MN), Southwest Florida FM Broadcasting, Ltd. (File No. BPH-880303MG), and Palm Tree FM Limited Partnership (File No. BPH-880303MQ), ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Mid-Coast
Radio Project, Inc.

Licensee of Radio
Station KKFI(FM)
Kansas City, Missouri

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1993; Released: April 30, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a $2,500 Notice of Apparent Liability (NAL) issued September 24, 1992;[1] and (2) a response to the NAL from Mid-Coast Radio Project, Inc. (Mid-Coast), dated October 26, 1992. Mid-Coast requests that the Commission reduce the amount of or rescind the forfeiture.

2. The forfeiture was assessed for a willful violation of Section 73.3527(d) of the Commission's Rules. On February 7, 1992, Mid-Coast personnel failed to make the Station KKFI(FM) public file available to an individual who had requested to look at the file during regular business hours. The facts of this case are set forth in detail in the NAL and will not be repeated here.

3. In support of its request that the forfeiture be reduced or rescinded, Mid-Coast denies that it refused to show the public file to the complainant. However, in its May 21, 1992, response to our letter of inquiry, Mid-Coast acknowledged that the complainant was not granted immediate access to the KKFI(FM) public file but was asked to make an appointment later in the day in order to view the file. The rule requires a licensee to make the public file available upon request during regular business hours. Mid-Coast's refusal to do so violated the rule.

4. Mid-Coast claims that the complainant had visited the station on several occasions in order to view various station files and that his actions constituted harassment. Mid-Coast also argues that the complainant was not a member of the general public in that he was a former on-air programmer of the station. Mid-Coast's arguments are without merit. A licensee may not impose restrictions on access to its public file simply because there may be ill-will between the requester and the licensee or because the requester previously worked for the station. *See Lakes Area Broadcasting Co.*, 38 FCC 2d 343, 345-46 (1972).

5. Mid-Coast contends that the exchange between the complainant and the staff persons at the station at the time the file was requested, as described in statements taken from the staff persons, shows that the request was to see "files," not the public file. This contention is rejected. Even if there had been some initial confusion on the staff's part as to which files the complainant wished to see, Mid-Coast acknowledges that when the request to view the station's files was refused, the complainant clearly alerted the staff that their actions violated the Commission's rules. The only file available to the complainant pursuant to the Commission's rules is the public file. In view of the foregoing, we conclude that Mid-Coast's staff knew that the file requested by the complainant was the public file.

6. Mid-Coast notes that the NAL was based in part on a prior incident involving its apparent failure in March 1991, to make the public file available upon request, which resulted in a letter of admonishment issued on September 25, 1991. Mid-Coast did not appeal that admonishment and only now contends that it should not have received it based on an internal investigation that revealed no rule violation. Mid-Coast therefore concludes that the present rule violation is not part of a pattern and that imposition of a forfeiture is unwarranted. We disagree. The March 1991 incident involved a violation of the public file rule and Mid-Coast was clearly placed on notice that compliance with the public file rule was important. Because it appears that Mid-Coast chose to ignore our warning, we conclude that imposition of a forfeiture is fully justified.

7. Mid-Coast argues that its financial condition warrants reduction or rescission of the forfeiture. Mid-Coast asserts that, during the last year, it lost its main source of income and that it has operated KKFI(FM) for the last year with no paid staff. Mid-Coast's financial documents, however, show that for the period ending September 30, 1992, the station's income exceeded its expenses by $4,500. It thus appears that the station has the financial capability for paying the forfeiture. Accordingly, we find no basis for reducing or rescinding the forfeiture.

8. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Mid-Coast Radio Project, Inc., licensee of Radio Station KKFI(FM), Kansas City, Missouri, FORFEIT to the United States the sum of two thousand five-hundred dollars ($2,500) for its willful violation of Section 73.3527(d) of the Commission's Rules. The payment should be in the form of a check or similar instrument, payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] *Mid-Coast Radio Project, Inc.*, 7 FCC Rcd 6272 (MMB 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-231

In the Matter of

Amendment of Section 73.202(b), RM-8076
Table of Allotments,
FM Broadcast Stations.
(Marlboro, Vermont)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 9, 1993; Released: April 30, 1993

By the Chief, Allocations Branch:

1. At the request of Mountain View Broadcasting, Inc. ("petitioner"), licensee of Station WXXK-FM, Channel 269A, Newport, New Hampshire, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 6813 (1992), proposing the deletion of vacant Channel 268A at Marlboro, Vermont. Petitioner filed comments. No other comments were received.

2. Petitioner states it continues to support the deletion of Channel 268A. Petitioner submits that the public interest would be served by deleting the channel allotment at Marlboro since it would enable petitioner to filed for an upgrade for Station WXXK-FM at Marlboro. Petitioner also states its intention to promptly file an application to increase the power of the facilities of Station WXXK-FM to 6 kilowatts if Channel 268A at Marlboro is deleted.

3. Our *Notice* proposing the deletion of the channel at Marlboro was premised on the fact that during a four year period the Commission had not received an acceptable application for Channel 268A. However, in response to our *Notice* four parties[1] have filed applications for Channel 268A at Marlboro. As stated in our *Notice* it is Commission policy not to delete a channel in which interest has been expressed. Therefore, since expressions of interest have been filed, the basis for the deletion of the Channel 268A is no longer valid.

4. IT IS ORDERED, That the petition for rule making filed by Mountain View Broadcasting, Inc. (RM-8076), IS DISMISSED.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission, SHALL SEND BY CERTIFIED MAIL, Return Receipt Requested, a copy of this Order to the following applicants for Channel 268A at Marlboro:

Robert P. Cham
25 West Street
Bristol, Vermont 05443

Dynacom Corporation
P.O. Box 1230
Claremont, New Hampshire 03743

Southern Vermont Radio
P.O. Box 850
West Dover, Vermont 05356

Vermont Community Broadcasters
1465 Hooksett Road #356
Hooksett, New Hampshire 03106

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Those parties are Robert P. Cham, Dynacom Corporation, Southern Vermont Radio, and Vermont Community Broadcasters.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-544

In the Matter of

Amendment of Section 73.202(b),	RM-7527
Table of Allotments,	RM-7615
FM Broadcast Stations.	
(Thief River Falls and	
Walker, Minnesota)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 12, 1993; Released: April 30, 1993

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration two Petitions for Reconsideration of the *Report and Order*, 5 FCC Rcd 10428 (1992), filed by Olmstead Broadcasting, Inc. ("Olmstead") and De La Hunt Broadcasting Corporation ("De La Hunt").[1] The *Report and Order* substituted Channel 256C1 for Channel 256C2 at Walker, Minnesota, and dismissed Olmstead's counterproposal requesting the substitution of Channel 257C2 for Channel 257A at Thief River Falls, Minnesota.

2. Olmstead requested the substitution of Channel 257C2 for Channel 257A at Thief River Falls and modification of its license for Station KKDQ-FM to specify operation on Channel 257C2. This request was mutually exclusive with a proposal filed by Thomas E. Ferebee and Sioux Valley Broadcasting ("Sioux Valley") requesting the substitution of Channel 256C1 for Channel 256C2 at Walker, Minnesota, and modification of its license for Station KLLZ-FM accordingly. Our analysis indicated that neither upgrade would provide first or second full time aural service and neither proposal would provide a first local transmission service. We conducted an engineering and population analysis of the proposals to determine which proposal could provide a new service to the largest population within the gain area of the predicted C2 and C1 service contours. Our analysis indicated that the upgrade at Walker would provide service to an additional 34,009 persons while the upgrade at Thief River Falls would provide service to an additional 28,859 persons. Based on that information, we substituted Channel 256C1 for Channel 256C2 at Walker and dismissed the counterproposal for Thief River Falls.

3. Olmstead now requests that the Commission partially reconsider its decision in the *Report and Order* by modifying the station at Thief River Falls from Channel 257A to Channel 257C3, in lieu of Channel 257C2, while retaining Channel 256C1 in Walker. Olmstead has determined that the public interest would best be served by permitting each community to receive expanded service. By using a restricted site for the Thief River Falls allotment, Olmstead contends that both Walker and Thief River Falls can be accommodated.

4. De La Hunt Broadcasting Corporation ("De La Hunt"), licensee of Station KDKK-FM, Channel 248C1, Park Rapids, Minnesota, filed a Petition for Reconsideration as an interested person pursuant to Section 1.429(b)(3) of the Commission's Rules.[2] According to De La Hunt, it is possible to serve the public interest by allotting Channel 256C1 at Walker and Channel 257C2 at Thief River Falls by placing a site restriction on the Walker allotment. De La Hunt argues that the public interest is at issue in this rule making proceeding, not the private interest of either KLLZ-FM, Walker or KKDQ(FM), Thief River Falls. De La Hunt claims that its alternate proposal would permit Station KKDQ(FM) to provide a first full-time aural service to 309 persons and a second aural service to 119 persons. Noting that this proposal would force Station KLLZ-FM to upgrade at a site other than its existing transmitter site, De La Hunt claims that the Commission's staff has imposed involuntary site changes to accommodate mutually exclusive upgrade proposals, citing *Rockport et al., Texas*, 4 FCC Rcd 8075 (1989).

5. De La Hunt opposes Olmstead's petition for reconsideration on four grounds. First, it claims that a Class C3 facility at Thief River Falls will not provide any first or second aural reception service, whereas a Class C2 facility would do so. Second, it argues that Olmstead has not filed a settlement agreement pursuant to Section 1.420(j) of the Rules in conjunction with its withdrawal of interest in a Class C2 facility. Third, De La Hunt argues that Olmstead has not made a commitment to build a Class C3 facility, if allotted. Finally, De La Hunt argues that Olmstead's original counterproposal was not verified pursuant to Section 1.52 of the Rules and should therefore be dismissed.

6. Sioux Valley Broadcasting Company ("Sioux Valley"), licensee of Station KLLZ-FM, Channel 256C1, Walker, filed comments supporting the petition for reconsideration filed by Olmstead. Sioux Valley has no objection to the allotment of Channel 257C3 at Thief River Falls as it will not disturb the upgrade at Walker. However, Sioux Valley opposes the petition for reconsideration filed by De La Hunt as it proposes a new site for Station KLLZ-FM that is located in the Chippewa National Forest. Sioux Valley points out that the transmitter, tower, transmission line and antenna used for KLLZ-FM's present Class C2 operation can be used for Channel 256C1. It states that it would prefer to remain a Class C2 station than accept an upgrade at De La Hunt's proposed site. Sioux Valley argues that De La Hunt is commenting in this proceeding not over concern for the public interest but out of concern over competition from Station KLLZ-FM to De La Hunt's station in Park Rapids. Sioux Valley urges the Commission to adopt Olmstead's plan and terminate this proceeding.

7. In joint comments, Sioux Valley and Olmstead voice objections to De La Hunt's petition for reconsideration. First, they object to De La Hunt's estimates of first and

[1] Public Notice was given on April 28, 1992, of the Reconsideration filed by Olmstead (Report No. 1887) and on April 29, 1992, of the Reconsideration filed by De La Hunt (Report No. 1888).

[2] De La Hunt claims that "its principals reside within the proposed service area" of Station KLLZ-FM, Walker.

second aural reception service, and argue that, even if correct, the service does not mandate rejection of the Thief River Falls Class C3 proposal. Second, they argue that even if Olmstead's counterproposal was not signed and verified pursuant to Section 1.52, waiver of the procedural rule will cause no prejudice to any pending proposal. Third, they argue that Section 1.420(j) is inapplicable in this case, as Olmstead has neither dismissed nor withdrawn, but merely amended its proposal. However, they state that they will file a statement pursuant to 1.420(j), if requested. Fourth, while maintaining that a continuing expression of interest is unnecessary, Olmstead states that it will apply for and construct a Class C3 facility if allotted. In response, De La Hunt maintains that Olmstead should have amended its proposal to specify allotment of a Class C3, rather than a Class C2, facility before issuance of the *Report and Order*.

8. We will deny De La Hunt's petition for reconsideration. The *Report and Order*, after a comparative analysis, granted the upgrade at Walker at Station KLLZ-FM's licensed site. Although Station KLLZ-FM has not requested a new site, De La Hunt is now proposing, without Sioux Valley's consent, to relocate Station KLLZ-FM to accommodate a C2 channel at Thief River Falls for which there is no longer any interest. Since Olmstead has now proposed a C3 channel at Thief River Falls at a site compatible with Channel 256C1 at Walker, a site change at Walker is unnecessary. To allot the Class C2 channel to Thief River Falls while requiring the Walker station to relocate against the wishes of Sioux Valley would not be in the best interests of the public.[3] Requiring Olmstead to accept a Class C2 channel when it has requested a Class C3 channel would also not be in the public interest.

9. Contrary to De La Hunt's concern that Olmstead is in violation of Section 1.420(j) of the Commission's Rules, Olmstead has not withdrawn from the proceeding and is, therefore, not required to file a written dismissal agreement. De La Hunt further notes that Olmstead did not include an affidavit in accordance with Section 1.52 of the Commission's Rules. We recognize that Olmstead did fail to comply with Section 1.52 of the Commission's Rules which states that "a party who is not represented by an attorney shall sign and verify the document and state his address." Here, Olmstead failed to verify that the statements contained in the counterproposal were true and accurate to the best of its knowledge. However, since Channel 257C3 can be allotted to Thief River Falls without conflicting with Channel 256C1 at Walker, or any other pending request, we believe the failure of Olmstead to verify its statements should not result in the denial of expanded service to Thief River Falls.[4]

10. After reviewing Olmstead's request for partial reconsideration and the comments filed by Sioux Valley, we will grant the substitution of Channel 257C3 for Channel 257A at Thief River Falls, Minnesota, and modify the license for Station KKDQ(FM) accordingly. Although Olmstead now requests a lower class channel than originally sought in its proposal,[5] we see no reason to deny this request as we believe upgrading Channel 257A to a Class C3 facility at Thief River Falls along with the upgrade at Walker will provide the greatest public interest benefit to the area. *See, e.g., Bourbon and Columbia, Missouri*, 6 FCC Rcd 250 (1991). Channel 257C3 can be allotted to Thief River Falls in compliance with the Commission's spacing requirements at Olmstead's specified site.[6] Since Thief River Falls is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, we have authorized a modification of Olmstead's license for Station KKDQ(FM), Thief River Falls, Minnesota, to specify operation on Channel 257C3 in accordance with Section 1.420(g) of the Commission's Rules.

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Thief River Falls, Minnesota	257C3

12. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Olmstead Broadcasting Inc. IS GRANTED.

13. IT IS FURTHER ORDERED, That the petition for reconsideration filed by De La Hunt Broadcasting Corporation IS DISMISSED.

14. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KKDQ(FM), Thief River Falls, Minnesota, IS MODIFIED to specify operation on Channel 257C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

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[3] Sioux Valley has stated that it does not want a Class C1 upgrade at the site proposed by De La Hunt. We note that De La Hunt provides no evidence that actual, fully spaced transmitter sites are available at the alternate reference coordinates. *Cf. Rockport et al., Texas*, 4 FCC Rcd 8075 (1989) (alternate site proposed shown to be on dry land among other radio towers).

[4] This action should not be construed as releasing parties from the requirements of Section 1.52 of the Commission's Rules. Indeed, were we unable to make this allotment without prejudice to KLLZ-FM, Olmstead's failure to verify its pleading could have resulted in dismissal of its request.

[5] Olmstead's amended proposal seeking a lower class channel than that originally requested does not constitute an untimely counterproposal. *See, e.g., Carolina Beach et al., North Carolina*, 7 FCC Rcd 544, 547 (1992).

[6] The coordinates for Channel 257C3 at Thief River Falls are 48-04-52 and 96-20-05.

15. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Olmstead Broadcasting, Inc., licensee of Station KKDQ(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

16. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

John F. Garziglia
Pepper & Corazzini
200 Montgomery Building
1776 K Street, Northwest
Washington, D.C. 20006
(counsel for De La Hunt Broadcasting Corp.)

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-119

In the Matter of

Amendment of Section 73.202(b), RM-8215
Table of Allotments,
FM Broadcast Stations.
(Hali'imaile, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 13, 1993; Released: April 30, 1993

Comment Date: June 21, 1993
Reply Comment Date: July 6, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by RC Broadcasting, Inc. ("petitioner"), permittee of Station KPMW(FM), Channel 288A at Hali'imaile, Hawaii, requesting the substitution of Channel 288C for Channel 288A at Hali'imaile, Hawaii, and the modification of Station KPMW's construction permit to specify the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 288C for Channel 288A at Hali'imaile since it will provide the community with a wide coverage area FM service. Channel 288C can be allotted to Hali'imaile in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.9 kilometers (8 miles) southwest.[1] Petitioner notes that the proposed allotment is short-spaced to Channel K288CS, an FM translator station, which is afforded secondary status under the Commission's rules. As requested, we propose to modify petitioner's construction permit for Station KPMW-FM to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 288C at Hali'imaile or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Hali'imaile, Hawaii	288A	288CN

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 21, 1993,** and reply comments on or before **July 6, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dan J. Alpert
1250 Connecticut Avenue, N.W.
#700
Washington, D.C. 20036
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 288C at Hali'imaile are North Latitude 20-49-24 and West Longitude 156-27-27.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-117

In the Matter of

Amendment of Section 73.202(b), RM-8214
Table of Allotments,
FM Broadcast Stations.
(Kahalu'u, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 13, 1993; Released: April 30, 1993

Comment Date: June 21, 1993
Reply Comment Date: July 6, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Brewer Broadcasting Corp., ("petitioner"), licensee of Station KLEO(FM), Kahalu'u, Hawaii, requesting the substitution of Channel 291C for Channel 291A at Kahalu'u, and the modification of its license to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 291C for Channel 291A at Kahalu'u, since it would provide that community with a wide coverage area FM service. Channel 291C can be allotted to Kahalu'u in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 17.6 kilometers (11 miles) north[1] of the community.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kahalu'u, Hawaii	291A	291C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 21, 1993,** and reply comments on or before **July 6, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dan J. Alpert
1250 Connecticut Avenue, N.W.
#700
Washington, D.C. 20036
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 291C at Kahalu'u are North Latitude 19-44-30 and West Longitude 155-57-23.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-118

In the Matter of

Amendment of Section 73.202(b), RM-8219
Table of Allotments,
FM Broadcast Stations.
(Trenton, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 13, 1993; Released: April 30, 1993

Comment Date: June 21, 1993
Reply Comment Date: July 6, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robert D. Fogel, personal representative of the Estate of William H. Burckhalter ("petitioner"), licensee of Station WCWB(FM), Channel 269A, Trenton, Florida, requesting the substitution of Channel 269C2 for Channel 269A at Trenton and modification of the license to specify operation on the higher class channel. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 269C2 for Channel 269A at Trenton, since it would provide that community with a wide coverage area FM service. Channel 269C2 can be allotted to Trenton in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 27.4 kilometers (17 miles) southwest at petitioner's desired transmitter site.[1] In accordance with Section 1.420(g) of the Commission's Rules, we propose to modify the license for Station WCWB(FM) to specify operation on Channel 269C2.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Trenton, Florida	269A	269C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 21, 1993,** and reply comments on or before **July 6, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert D. Fogel
Legare, Hare & Smith
P.O. Box 578
63 Broad Street
Charleston, S.C. 29402
(Counsel for the Estate of
William H. Burckhalter)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 269C2 at Trenton are North Latitude 29-35-00 and West Longitude 83-05-50.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-214

In the Matter of

Amendment of Section 73.202(b),	RM-7101
Table of Allotments,	RM-7226
FM Broadcast Stations.	
(Homerville, Lakeland and	
Statenville, Georgia)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 14, 1993; Released: April 30, 1993

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration of the *Report and Order* in this proceeding, 6 FCC Rcd 5802 (1991), filed by Lakeland Broadcasters, Inc. ("Lakeland").[1] The *Report and Order* granted a petition for rule making filed by La Taurus Productions, Inc. ("La Taurus"), which proposed an allotment of Channel 254A to Statenville, Georgia, as that community's first local FM transmission service. The *Report and Order* denied a petition for rule making filed by Lakeland requesting substitution of Channel 290C3 for Channel 290A and modification of its construction permit to specify the higher class channel at Lakeland, Georgia, as well as the substitution of Channel 254A for Channel 288A at Homerville, Georgia, to accommodate the upgrade at Lakeland. La Taurus filed an opposition to Lakeland's petition for reconsideration and Lakeland filed a reply.

2. *Background.* This proceeding originated with a petition for rule making filed by Lakeland, permittee of Station WHFE(FM), Channel 290A, Lakeland, Georgia, requesting the substitution of Channel 290C3 for Channel 290A and modification of its construction permit (BPH-870910NV) to specify the higher class channel. In order to accommodate this substitution, Lakeland requested the substitution of Channel 254A for Channel 288A at Homerville, Georgia, and the modification of Station WBTY(FM)'s license to specify operation on Channel 254A. A second, mutually exclusive petition, filed on behalf of La Taurus, requested the allotment of Channel 254A to Statenville, Georgia, as that community's first local transmission service. A *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 2685 (1990), was issued indicating that the proposals would be comparatively considered and requested comments to the Lakeland and La Taurus proposals.[2] The *Order to Show Cause* required Station WBTY, Channel 288A, Homerville, Georgia, to show cause as to why its license should not be modified as proposed by Lakeland.[3]

3. In response to the *Notice*, Lakeland proposed the use of alternate Channel 248A at Statenville, in lieu of Channel 254A, to eliminate any conflict between the two proposals. Lakeland provided site coordinates as well as an engineering study showing that Channel 248A could be allotted to Statenville. La Taurus challenged Lakeland's alternative proposal, claiming that Lakeland's proposed site was "at the heart of the Okefenokee swamp"[4] and argued that Channel 248A from that site would not provide city grade coverage to Statenville as required by Section 73.315 of the Commission's rules.

4. The *Report and Order* denied Lakeland's request to allot Channel 248A to Statenville. It stated that "the proposed site [for Channel 248A] is in a swamp, and much of the area consists of wetlands. Therefore, site flexibility would be limited." Specifically, the *Report and Order* stated that a site restriction of 16.9 kilometers (10.5 miles) would be required to allot Channel 248A to Statenville. The maximum distance for city grade coverage is 16.2 kilometers (10.1 miles). The 16.9 kilometer site restriction was based on the Commission's own engineering analysis which indicated such a restriction would be necessary to avoid a short spacing to Station WQHL(FM), Channel 251C2, Live Oak, Florida. Furthermore, it stated that Channel 248A would not provide Statenville with city grade coverage. A staff engineering analysis determined that there were no other alternative channels available to resolve the technical conflict between the two proposals. In a comparative analysis of the proposals pursuant to the Commission's FM allotment priorities,[5] first local FM service to Statenville was preferred over Lakeland's proposal to upgrade its existing facility. Therefore, Channel 254A was allotted to Statenville, Georgia, as that community's first local FM transmission service. The Lakeland proposal to upgrade Channel 290A to Channel 290C3 was denied.

5. *Petition for reconsideration.* Lakeland argues that the Commission failed to fully consider Lakeland's alternate proposal to allot Channel 248A to Statenville. Lakeland contends that the Commission gave undue weight to statements made by La Taurus with respect to the actual boundaries of the area known as Statenville, as well as the suitability of Lakeland's proposed site. Lakeland objects to statements in the *Report and Order* indicating that a site

[1] Public notice of the filing of Lakeland's petition was given on December 11, 1991, Report No. 1869.

[2] The *Notice* also requested that La Taurus provide additional information demonstrating the community status of Statenville. Although Lakeland disputed the community status of Statenville, the *Report and Order* determined that Statenville is a community for allotment purposes. Lakeland has not challenged this determination in its petition for reconsideration.

[3] Southern Broadcasting and Investment, the licensee of Station WBTY(FM), Homerville, Georgia, did not respond to the *Order to Show Cause*, and therefore, pursuant to Section 1.87 of our rules, the licensee is deemed to have consented to the modification as proposed.

[4] Although La Taurus' "Reply to Comments of Lakeland Broadcasters, Inc. and HVS Partners" stated that the site is "in the heart of the Okefenokee Swamp," the engineering statement included with the comments points out that the site is 20 miles west of the Okefenokee Wildlife Refuge in an area of both wet and dry lands.

[5] *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

restricted station on Channel 248A could not provide city grade coverage to the community, as the decision did not specify how that determination was made. Lakeland also refutes allegations that Lakeland's proposed transmitter site for Channel 248A is in a swamp.

6. La Taurus' opposition argues that a station operating on Channel 248A would not provide city grade coverage to Statenville. La Taurus alleges that a Georgia Department of Transportation ("GDOT") map and an unofficial South Georgia Area Planning and Development Commission map, as well as their engineering reports, delineate the borders of Statenville, and that the site restricted Channel 248A would not provide coverage to all businesses and public buildings as well as habitable dwellings within those borders. La Taurus also contends that the proposed site is unsuitable because it is in the "immediate vicinity of Sand Hill Bay, Ruddy Bay and Boggy Bay" and that the present owner of this land has stated that these areas are not available for the construction of a tower.

7. In response, Lakeland refutes La Taurus' allegations that the proposed alternate channel at their specified site could not provide city grade coverage. Lakeland alleges that there is, at best, confusion over the actual boundaries of Statenville. For instance, Lakeland notes that the GDOT map submitted by La Taurus indicates the urban area boundary around the area of Statenville, which the map's legend indicates is an incorporated city. Lakeland points out, however, that both La Taurus and the Commission have stated that Statenville is an unincorporated community. Lakeland therefore deduces that there is some confusion over the status of Statenville and that of its official boundaries. Therefore, Lakeland contends that based on the actual population distribution within the Statenville area, a station operating on Channel 248A from its proposed transmitter site will provide the requisite city grade coverage.[6]

8. Lakeland denies the allegations by La Taurus that the proposed site is both unsuitable and unavailable. Lakeland asserts that its proposed site is not in the "immediate vicinity" of Sand Hill Bay, Ruddy Bay or Boggy Bay, but is several kilometers east of these areas. Lakeland submits a letter from Savannah Tower Company indicating that a 350 foot "stacked" tower can be completed in 10 days and that "wet land areas are not a major problem when stacking a tower of this size." Lakeland also submits a letter from the North Florida Tower Service, Inc., confirming that a tower can be constructed in this area and also indicating that a property owner in the immediate area is willing to lease the land to a successful permittee for the construction of a tower.

9. Lakeland contends that based on the record, the Commission should not have denied the proposed alternate channel at Statenville and should now reconsider that decision. Lakeland requests that Channel 248A be allotted to Statenville in lieu of Channel 254A, that Channel 254A be substituted for Channel 288A at Homerville, Georgia and that Lakeland's request for the substitution of Channel 290C3 for Channel 290A at Lakeland, Georgia be granted.

10. *Discussion*. We will grant Lakeland's petition for reconsideration. Upon review of the record before us, we find that all of the proposed changes can be implemented in accordance with Commission rules. The restricted site referred to in the *Report and Order* is no longer applicable because Station WQHL(FM), Live Oak, Florida, has since received a requested upgrade from Channel 251C2 to Channel 251C1 at a new site.[7] In addition, the concerns expressed in the *Report and Order* with respect to site availability and city grade coverage can now be resolved.

11. At the allotment stage the Commission requires that a theoretical transmitter site exist from which a station can be operated in compliance with our rules.[8] However, in this instance there is a dispute as to whether the proposed transmitter site is located in an area of "both wet and dry lands" as opposed to a site located in the middle of a swamp.[9] Our engineering analysis indicates that the transmitter site is not "in the heart of the Okefenokee swamp" but is located in an area which consists of both wet and dry lands, with enough dry land to provide a suitable site for construction.[10] The site specified herein is also located several kilometers east of the areas which La Taurus states are unsuitable and unavailable for tower construction.[11] Therefore, we believe that Lakeland has sufficiently evidenced the availability of a transmitter site to rebut La Taurus's arguments that no such site exists.

12. We have determined that the boundaries of Statenville as indicated on the GDOT map provided by La Taurus should be used for the purpose of determining the compliance with our city grade coverage requirements. Although the map indicates that the former government of Statenville is "inactive", the map's legend indicates the boundaries are those of an incorporated community. Therefore, it would appear that boundaries established for purposes of incorporation are left intact once established, even if the community's government becomes inactive. We have carefully reviewed this map and performed our own engineering analysis to verify that the community of

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[6] Lakeland refers to *Fort Rucker and Geneva, Alabama; Blakely, Georgia*, 5 FCC Rcd 37 (1990) as an instance in which we allotted a channel from a site that would provide city grade coverage to the populated area within a community's boarders. It further states that a limited waiver of Section 73.315 would be appropriate, although it is unclear whether or not such a waiver would actually be needed. We need not reach this issue, as our engineering analysis indicates that Channel 248A will provide city grade coverage pursuant to Section 73.315 of the Commission's Rules from the site specified in this *Memorandum Opinion and Order*. *See* paragraph 12, infra.

[7] *See Live Oak, Florida*, 6 FCC Rcd 1398 (1991).

[8] *See, e.g., West Palm Beach, Florida*, 3 FCC 5810 (1988), *recon. denied*, 6 FCC 6975 (1991), *Stamping Ground, Kentucky*, 5 FCC Rcd 1772 (1990).

[9] *See, e.g., Bayboro, North Carolina*, 6 FCC Rcd 4850 (1991) In this case the petitioner's proposed site was determined to be in the water and therefore unsuitable. On its own motion, the Commission proposed an alternate site on land which complied with the Commission's rules.

[10] Our engineering analysis indicates that the site specified herein, as well as the site proposed by Lakeland are both 27.5 and 28 miles, respectively, from the western boundary of the Okefenokee Wildlife Refuge, and hence there should be no difficulty in locating a tower outside of this national park.

[11] We note that Lakeland has provided the name and phone number of a property owner willing to lease land in the area of the transmitter site proposed by Lakeland for the construction of a tower for Channel 248A.

Statenville, as determined by the boundaries established for purposes of incorporation, will receive city grade coverage from either the site proposed by Lakeland or the less restrictive transmitter site specified herein, as required by Section 73.315 of our rules.

13. We believe that the public interest would be served by the allotment of Channel 248A in lieu of Channel 254A at Statenville, Georgia, thereby providing that community with its first local FM service. Channel 248A can be allotted to Statenville with a site restriction of 15.5 kilometers (9.6 miles) northeast of the community to avoid a short spacing to Station WJAD(FM), Channel 247C, Bainbridge, Georgia and to Station WQHL, Channel 251C1, Live Oak, Florida.[12] The application of La Taurus for Channel 254A at Statenville must be amended to reflect this change in channels and transmitter site. The substitution of channels at Statenville will permit the allotment of Channel 290C3 for Channel 290A at Lakeland, Georgia, with a site restriction 1.3 kilometers (0.8 miles) west of the community, providing that community with wide area service.[13] To accommodate these changes, Channel 254A will be substituted for Channel 288A, Station WBTY, Homerville, Georgia.[14] We will amend the license of Station WBTY to reflect the new channel. Pursuant to Commission policy, Lakeland has agreed to reimburse Homerville for the necessary expenses involved in the change of channels.[15] In addition, the application of Station WXMK, Channel 290C3, Dock Junction, Georgia must be amended to conform to our minimum spacing requirements with respect to Channel 290C3 at Lakeland, Georgia. The permittee of Channel 290A, Live Oak, Florida must also amend its application to specify a site in compliance with the minimum spacing rules of the Commission.[16]

14. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1993,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Statenville, Georgia	248A
Lakeland, Georgia	290C3
Homerville, Georgia	254A

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WHFE(FM), Lakeland, Georgia, IS MODIFIED to specify operation on Channel 290C3 in lieu of Channel 290A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1307 of the Commission's Rules.

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WBTY(FM), Homerville, Georgia IS MODIFIED to specify operation on Channel 254A in lieu of Channel 288A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the authorization for Station WPTY(FM), except the channels as specified above. Any other changes, except those so specified under Section 73.1260 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1260 of the Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

17. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Lakeland Broadcasters, Inc. IS GRANTED.

18. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Memorandum Opinion and Order* by Certified Mail, Return Receipt Requested, to La Taurus Productions, Inc., 1103 West Magnolia Street, Valdosta, GA 31601; to Southland Radio, Inc., Station WXMK(FM), 108 Benedict Road, Brunswick, GA 31520; to Leon F. Pettersen, Station WLVO(FM), P.O. Box 8391, Madeira Beach, FL 33738; and to Southern Broadcasting & Investment, Station WBTY(FM), P.O. Box 577, Homerville, GA 31634.

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

20. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

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[12] The coordinates for Channel 248A at Statenville are North Latitude 30-45-40 and West Longitude 82-52-45. We note that Lakeland's proposed site is located at North Latitude 30-46-25 and West Longitude 82-52-50. Lakeland's coordinates correspond to a site restriction of 16 kilometers (10 miles) northeast of Statenville. The coordinates specified herein represent a less restricted site and are therefore preferable to Lakeland's proposed site. *See Vacaville, California,* 4 FCC Rcd 8315 (1989).

[13] The coordinates for Channel 290C3 are North Latitude 31-02-25 and West Longitude 83-05-00.

[14] The coordinates for Channel 254A at Homerville are the same as those for its licensed site on Channel 288A, North Latitude 31-02-04 and West Longitude 82-51-50.

[15] *See Circleville, Ohio,* 9 RR 2d 1579.

[16] We note that Lakeland's proposal was filed prior to the effective date of MM Docket 91-348, *Conflicts between Applications and Petitions for Rulemakings to Amend the FM Table of Allotments (Report and Order),* 7 FCC Rcd 4917 (1991).

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carrier Line
Information Database

Petitions for Waiver of Part 69 of
the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1993; Released: April 30, 1993

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In an Order issued December 30, 1991,[1] the Common Carrier Bureau (Bureau) granted a number of local exchange carriers (LECs)[2] waivers of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to establish (1) rate elements for transmission services connecting customers to the carriers' common channel signalling (CCS) networks; and (2) rate elements for access to the data in their line information databases (LIDB). The waivers were granted to the extent that the petitioners complied with the *Southwestern Bell LIDB Order*[3] permitting new rate elements for provision of LIDB access services.[4] On January 15, 1992, the National Telephone Cooperative Association (NTCA) filed an application for review of the *LEC LIDB Order*. On January 29, 1992, Allnet Communication Services, Inc. (Allnet) filed an application for review of the *LEC LIDB Order*. On February 13, 1992, Ameritech and BellSouth each filed oppositions to Allnet's application for review. NTCA's application for review was unopposed. Allnet filed a reply to the oppositions on February 25, 1992. For the reasons discussed below we deny the application for review filed by Allnet and dismiss the application filed by NTCA.

II. DISCUSSION

2. In its application Allnet appears to be making three arguments.[5] First, Allnet argues that the Bureau has adopted a policy that requires local exchange carriers to adopt a flat-rated transport rate structure which conflicts with the Order portion of the Commission's *Transport NPRM*.[6] Allnet Application at 2; Reply at 2, 3-5. Allnet insists that the fact that the Bureau claims to be allowing these "unlawful rate structures" to take effect pending the outcome of the transport rulemaking does not justify a rate structure that "clearly conflicts with the Commission's *directives*." Allnet Application at 2-3 [emphasis in original].

3. In their oppositions, Ameritech and BellSouth aver that the Bureau acted consistently with the Commission's *Transport NPRM*. Ameritech Opposition at 2; BellSouth Opposition at 1-2. Ameritech argues that, in the *Transport NPRM*, the Commission required LECs "to maintain their current rate structure for transport, *pending further agency action*,. ..." thereby leaving open the possibility for further agency action. Ameritech Opposition at 2, citing *Transport NPRM*, 6 FCC Rcd at 5349. *See also* BellSouth Opposition at 1-2. Moreover, insists Ameritech, "the overarching purpose of the *Transport NPRM* was to temporarily preserve in place the 'equal charge per unit of traffic' rule pending a review of an access charge system to replace 'equal charge.' It was not designed to bar the Bureau from continuing to allow necessary waivers in the transport rules." Ameritech Opposition at 2.

4. Allnet's claim that the Bureau's action constitutes the adoption of a "policy" in conflict with the Commission is unfounded. The Bureau granted a waiver of the requirements of the *Transport NPRM* as the Bureau is authorized to do pursuant to delegated authority in Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291. Moreover, in the *Southwestern Bell LIDB Order*, the Bureau explicitly addressed the relationship between its action on the waiver and the Commission's action in the *Transport NPRM*. After discussing the Commission's policy objectives in the Transport proceeding and the effect of a flat rated charge for CCS interconnection, the Bureau determined that "pricing the signalling link on a flat rate basis does not conflict with the Commission's goals in the *Transport Proceeding*," and therefore waived the requirements of the Order portion of the *Transport NPRM* "to the extent necessary to permit Southwestern Bell to tariff the elements permitted by this Order."[7] In the *LEC LIDB Order*

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[1] Local Exchange Carrier Line Information Database, 7 FCC Rcd 525 (Com. Car. Bur. 1991) (*LEC LIDB Order*).

[2] Those carriers are Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), GTE Telephone Operating Companies (GTE), NYNEX Telephone Companies (NYNEX), Pacific Bell Telephone Companies (Pacific Bell), Southwestern Bell Telephone Company (SWB), United Telephone System (United), and US West, Inc. (US West).

[3] Southwestern Bell Telephone Company, Petitions for Waiver of Part 69 of the Commission's Rules, DA 91-1258, 6 FCC Rcd 6095 (Com. Car. Bur. 1991) (*Southwestern Bell LIDB Order), recon. dismissed*, 7 FCC Rcd 5566 (Com. Car. Bur. 1992), *review denied*, 7 FCC Rcd 6539 (1992).

[4] The Bureau also suspended those transmittals for one day, imposed an accounting order, and initiated an investigation of the tariffs captioned above. On March 20, 1992, the Bureau issued the *LIDB Designation Order*, identifying the specific issues being investigated. Local Exchange Carrier Line Information Database, CC Docket No. 92-24, 7 FCC Rcd 2169 (Com. Car. Bur. 1992) (*LIDB Designation Order)*. That investigation is pending before the Commission.

[5] Allnet also states that Section 1.115(b) of the Commission's Rules, 47 C.F.R. § 1.115(b), prohibits the Bureau from taking any action that is "in conflict with statute, regulation, case precedent, or established Commission policy." Allnet Application at 2; Reply at 2, 3-5. Allnet is incorrect. Section 1.115(b) establishes standards for the content of applications for review, not standards for the Bureau's exercise of its delegated authority. It does not "prohibit" the Bureau from doing anything. Rather, Section 1.115(b) specifies the showing that Allnet, as applicant, must make in its application for review. Of course, to the extent that Allnet could make such a showing, the Bureau action would be reversed.

[6] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, and Transport Rate Structure and Pricing, CC Docket No. 91-213, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341 (1991) (*Transport NPRM).*

[7] *Southwestern Bell LIDB Order*, 6 FCC Rcd at 6100.

the Bureau determined that the petitioning LECs sought authority to establish the rate structure approved in the *Southwestern Bell LIDB Order* and, therefore, granted those requests.[8] Thus, contrary to Allnet's assertions, the Bureau's action did not conflict with a Commission directive. Moreover, Allnet's argument that the Bureau's action conflicts with the Commission's policy for transport rate structure is now moot, since the rate structure for the CCS interconnection portion of the LIDB access service is consistent with the interim transport rate structure, and specifically with the rate structure for dedicated signalling transport, adopted in the recently released *Transport Report and Order*.[9]

5. Allnet also argues that the Bureau's actions are arbitrary and capricious because they conflict with its earlier determination in the *Ameritech Order*[10] that "flat rate structures for SS7 are improper." Allnet Application at 3; Reply at 4. Allnet mischaracterizes the Bureau's earlier Order.[11] Contrary to Allnet's representation in its application, the Bureau did not determine in that order that any and all "flat rate structures for SS7 interconnection are improper." Rather, the Bureau rejected Ameritech's waiver request because Ameritech did not make the showing of particular facts and circumstances demonstrating good cause and justifying a waiver, required pursuant to *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).[12] Thus, there is no inconsistency between the *LEC LIDB Order* and the *Ameritech Order*.

6. Finally, Allnet charges that the Bureau did not properly apply the standards for granting a waiver of the Commission's Rules. Allnet Application at 3, *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Allnet asserts that *WAIT Radio* "requires that the applicant for the waiver 'plead with particularity the facts and circumstances which warrant such action.'" Reply at 2, *citing WAIT Radio*, 418 F.2d at 1157. Allnet asserts that no such showing has been made here for the waiver of Commission policy. *Id.* at 2-3.[13]

7. Ameritech responds that nothing in the *Transport NPRM* changes or prohibits application of the Commission's waiver rule (47 C.F.R. Section 1.3) in this case. Ameritech Opposition at 3. Ameritech and BellSouth also contend that the Bureau did find that good cause existed for granting the waiver requests. Ameritech Opposition at 3; BellSouth Opposition at 2. Ameritech asserts that, in the *Southwestern Bell LIDB Order*, the Bureau properly concluded that the Commission's existing Part 69 rules are not designed to accommodate LIDB service. Ameritech Opposition at 3. Consequently, argues Ameritech, the Bureau found that strict application of the Commission's rules would be inconsistent with the public interest, since absent a waiver the service could not be provided, and correctly found that the proper structure for the proposed new service should include flat-rated designated network access line and port charges which are consistent with the philosophy of recovering costs from the cost causer and with the manner in which the costs are incurred by the LEC. *Id. See also* BellSouth Opposition at 1-2.

8. As we understand Allnet's application, Allnet claims that the Commission's waiver standards were not satisfied because neither the applicants, nor the Bureau in its order, had identified reasons for permitting waivers of the requirements in the *Transport NPRM*. Allnet is incorrect. In the *Southwestern Bell LIDB Order*, the Bureau determined that Southwestern Bell had demonstrated good cause to establish the new rate elements. The Bureau correctly stated that the Commission has discretion to waive a rule whenever particular facts would make strict compliance inconsistent with the public interest.[14] The Bureau explained that CCS interconnection service will improve service by providing faster call set-up and facilitating non-discriminatory access to LIDB, as well as other databases. As the Bureau noted, a switched service like LIDB, which requires that both the port and transmission facilities be dedicated to the use of a single customer, was not contemplated at the time the access rules were adopted.[15] The Bureau determined that the creation of the proposed separate rate elements for this service would be consistent with the Commission goal of recovering costs from the "cost causer."[16] Thus, the Bureau determined that a proper showing had been made by Southwestern Bell to justify granting the waiver requests.[17] In reviewing the LECs' waiver requests, the Bureau determined that the petitioners had met their burden and granted those waiver requests to the extent that they comply with the *Southwestern Bell LIDB Order*.[18] The Commission recently released

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[8] *LEC LIDB Order*, 7 FCC Rcd at 527.

[9] Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7052-53, ¶ ¶ 99-102 (1992) (*Transport Report and Order*).

[10] Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, 6 FCC Rcd 746 (Com. Car. Bur. 1991) (*Ameritech Order*). In that order, Ameritech was denied a waiver of Part 69 to establish a new rate element for the Signal Transfer Point (STP) port charge of its new STP access service.

[11] *See Ameritech Order*, 6 FCC Rcd at 746.

[12] *Id.* at 747-748. The Bureau noted that Ameritech cited no special circumstances that prevented it from providing out-of-band signalling as part of a transport offering that complies with existing rules, observing that BellSouth was able to do so. The Bureau further commented that Ameritech made no showing that application of the existing Part 69 Rules would cause it undue hardship, would be inequitable, or would impair effective implementation of the Commission's overall policies. *Id.* at 747.

[13] In its Reply, Allnet also charges that the Bureau's action constitutes a rulemaking action. Reply at 2-3. This is incorrect. The Bureau granted individual waivers of the application of a particular rule. The order does not require, as a rule would, that all carriers providing LIDB access service, use this rate structure. The Bureau merely permitted the petitioning LECs to provide LIDB access service in this manner. It did not change Part 69 of the Commission's Rules. *See generally, LEC LIDB Order*, 7 FCC Rcd 525.

[14] *Southwestern Bell LIDB Order*, 6 FCC Rcd at 6099.

[15] *Id.*

[16] *Id.* at 6099-6100. As discussed above, the Bureau also explained that permitting a flat-rated charge for the service is consistent with the goals articulated for switched transport pricing because it: (1) promotes efficient use of facilities by allowing the LECs to price in the manner that best reflects the way in which costs are incurred; (2) is conducive to full and fair interexchange competition; and (3) does not interfere with the development of access competition. *See also* ¶ 4, *supra*.

[17] *Id.*

[18] *See LEC LIDB Order*, 7 FCC Rcd at 525, 527.

its decision affirming the *Southwestern Bell LIDB Order*.[19] Accordingly, we deny the application for review filed by Allnet.

9. NTCA did not participate in the waiver proceedings before the Bureau. NTCA now argues that, although it did not participate in the earlier stages of this proceeding, the Commission should nevertheless consider its application for review. NTCA Application at 2. Section 1.115(a) of the Commission's Rules, 47 C.F.R. § 1.115(a), states that any person seeking review of a decision taken pursuant to delegated authority who is not a party to a proceeding must show "... good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed." NTCA proffers no explanation for its lack of participation prior to filing its application for review. Consequently, we dismiss NTCA's application for review.[20]

III. CONCLUSION AND ORDERING CLAUSES

10. For the reasons discussed above, we deny the application for review filed by Allnet and dismiss the application for review filed by NTCA.

11. Accordingly, IT IS ORDERED that the application for review filed by National Telephone Cooperative Association IS DISMISSED.

12. IT IS FURTHER ORDERED that the application for review filed by Allnet Communication Services, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[19] *See* 7 FCC Rcd 6539 (1992).

[20] *Cf.* Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company, 7 FCC Rcd 4192 (1992) (dismissing a petition for reconsideration pursuant to 47 C.F.R. §1.106(b)(1) for failure to show "good reason" for failing to participate at earlier stages). Because we dismiss NTCA's application as procedurally deficient, we do not address the substantive issues advanced by NTCA.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-136

In the Matter of

DAVID R. PRICE
Licensee, Radio Station WOKJ(AM)
Jackson, Mississippi

Order to Show Cause Why the License of Station WOKJ(AM), Jackson, Mississippi, Should Not Be Revoked

and

Notice of Forfeiture

ORDER

Adopted: April 23, 1993; **Released: April 30, 1993**

By the Commission:

1. By Memorandum Opinion and Order, *David R. Price*, 7 FCC Rcd 6550 (1992), we affirmed the Review Board's decision, 7 FCC Rcd 1838 (Rev. Bd. 1992), which revoked the license of David R. Price for radio station WOKJ(AM), Jackson, Mississippi, and assessed a $8,000 forfeiture against him for, *inter alia*, failing to illuminate the WOKJ towers during periods of darkness for five months.[1] In doing so, we agreed with the Board that revocation of license and forfeiture were well warranted in this case in view of the egregious nature of Price's transgressions, *i.e.*, despite repeated admonitions from the Commission and the FAA that the unlit towers were a serious threat to air traffic, Price nonetheless permitted WOKJ's six 388-foot towers -- located just 2.5 miles from the nearest airport -- to remain unlit from July 20 until December 21, 1990, and compounded that situation by failing to take any meaningful measures to eradicate the situation, by making a misleading suggestion to the Commission that the tower lighting problem would be quickly resolved, and by completely failing to respond to some Commission correspondence, including the Notice of Violation, and failing to timely respond to other Commission correspondence. *Id.* at 6550 ¶ ¶ 6-7.

2. Price now urges us to reconsider our decision and not revoke WOKJ's license.[2] We will deny that request. Price has not established a basis for reconsideration by either alleging new facts or changed circumstances which arose after Price's last opportunity to present such matters, or by alleging facts which were unknown and could not have been discovered through the exercise of ordinary diligence. *See* 47 C.F.R. § 1.106(b)(2). Rather, Price's petition simply reargues allegations that were made by him in his earlier appeals in this case; namely, that he made every effort to restore the towers' lighting, that it was only after the Commission contacted the power company that the lighting was restored based on Price's promise to pay down the bill over a period of months, and that he did not intentionally mislead the Commission about the matter. The Board, however, fully considered and rejected those allegations (7 FCC Rcd at 1844 ¶ 23) and so did we in affirming its decision (7 FCC Rcd at 6550 ¶ 6). It is well established that reconsideration will not be granted to debate matters upon which the Commission has already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

3. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed November 9, 1992, by David R. Price IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] We reduced the amount of forfeiture from $20,000 to $8,000 so as to conform it to a recent change of policy governing forfeitures for violations of the lighting and marking requirements for communication towers. *Id.* at 6551 ¶ 8.

[2] Petition for Reconsideration filed November 9, 1992, and Opposition thereto filed November 18, 1992, by the Mass Media Bureau.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 26, 1993

Released: April 30, 1993

Mr. G. Michael Crumling 1600 E1
Director - Federal Relations
US West, Inc.
1020 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Crumling:

This is in response to your letter of February 22, 1993, which gave notice of US West's intent to adopt Statement of Financial Accounting Standards No. 112 (SFAS-112), "Employers' Accounting for Postemployment Benefits." In this letter, you stated that US West proposes to adopt SFAS-112 for regulatory purposes effective January 1, 1993, with implementation on a phase-in basis over three years.

Your letter states that a three year phase-in of SFAS-112 is necessary because adopting it on a flash-cut basis would have an adverse impact on the company's 1993 regulated operating results. You also contend that the phase-in plan is consistent with the Commission's Order adopting Generally Accepted Accounting Principles (GAAP) because it allows implementation to the extent regulatory considerations permit. In support of this position, you argue that the Commission used a phase-in approach in adopting GAAP accounting for compensated absences[1] and postretirement benefits[2] in order to lessen the revenue requirement impact of those standards.

After reviewing SFAS-112, we believe that it is proper to allow carriers to adopt it for regulatory purposes. The accrual method of accounting on which it is based is the foundation of Part 32 accounting and its adoption will not conflict with the Commission's regulatory objectives. We do object, however, to US West's proposal to implement SFAS-112 over a three year period. This phase-in proposal by US West is not consistent with GAAP. Implementation in conformance with GAAP requires the use of the flash-cut approach. US West's argument that the Commission used phase-in approaches previously to implement accounting for compensated absences and postretirement benefits does not justify departure from GAAP in this instance. The circumstances surrounding the adoption of SFAS-112 are not comparable to those surrounding compensated absences. The estimated impact on the industry's revenue requirement of adopting compensated absences on a flash-cut basis was several times greater than our estimate of the flash-cut impact of adopting SFAS-112. Furthermore, the accounting for compensated absences was implemented along with the Commission's new accounting system[3] and was only one of several significant revenue requirement increases that the Commission had to consider at that time. Thus, in view of these differences, the manner in which the compensated absences standard was implemented does not justify the use of a phase-in approach for SFAS-112.

With respect to postretirement benefits, we estimated that the one time charge to expense that would have resulted from flash-cut implementation was so large that it would seriously distort the carriers' operating results. Moreover, by adopting a twenty year phase-in period for accounting for the effects of postretirement benefits, we did not depart from GAAP because this phase-in was provided for in SFAS-106. However, SFAS-112 does not provide an option for using a phase-in period.

Based on the above, US West's proposal to implement SFAS-112 on a phase-in basis is denied. Moreover, to further the Commission's goal of minimizing the differences between carriers' accounting for regulatory purposes and the accounting used for external financial reporting purposes, US West should adopt SFAS-112 for regulatory purposes at the same time it adopts SFAS-112 for financial reporting purposes.

If you have any questions on this matter, please contact me at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

[1] Statement of Financial Accounting Standards No. 43 (SFAS-43), "Accounting for Compensated Absences", issued November 1980.

[2] Statement of Financial Accounting Standards No. 106 (SFAS-106), "Employers' Accounting for Postretirement Benefits Other Than Pensions", issued December 1990.

[3] Even though SFAS-43 was adopted by the Financial Accounting Standards Board in 1980, its requirements were not incorporated into the Uniform System of Accounts until January 1, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Headliner Radio, Inc. 8310-HTS
Licensee, Radio Station KSXY-FM
(formerly KFIG-FM)

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1993; Released: April 30, 1993

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL) issued on November 5, 1992, for three thousand one hundred twenty five dollars ($3,125) against Headliner Radio, Inc., licensee of Radio Station KSXY-FM, Fresno, CA, and (2) a response to the NAL received January 13, 1993, requesting rescission of the forfeiture.

2. The NAL was issued to Headliner Radio, Inc., for its apparent repeated violation of Section 73.1216 of the Commission's Rules. The Commission determined that the licensee of Station KSXY-FM aired a misleading promotional advertisement for a contest it conducted. The facts are set forth in full in the NAL, are uncontroverted, and will not be repeated here.

3. The licensee has raised no new arguments warranting rescission or mitigation of the Notice of Apparent Liability. In fact, the response submitted suggests that the licensee continues to misunderstand the contest rule. The licensee suggests that it must receive a financial gain from the contest and must intend to deceive the public with the misleading contest in order for the Commission to find a violation of Section 73.1216.

4. Section 73.1216 requires licensees that "broadcast information about a contest [to] fully and accurately disclose the material terms of the contest, and [to] conduct the contest substantially as announced or advertised." It also states that "no contest description shall be false, misleading or deceptive with respect to any material term." Section 73.1216 makes no mention of the licensee's financial gain. Furthermore, because the violation has been "repeated" in this instance, which the Act specifies as an alternative justification to "willful" for assessing forfeitures, it is irrelevant whether the licensee "willfully" violated the law or intended to violate the law. *See* 47 U.S.C. § 503. *See also, Southwestern Broadcasting Corporation*, 9 FCC 2d 224, 226 (1967); *Lotus Broadcasting Corporation*, 9 FCC 2d 227, 228-29 (1967); *Hale Broadcasting Corporation*, 79 FCC 2d 169, 171 (1980). Moreover, while Headliner Radio, Inc., contends that it carried out the contest precisely as the contest was presented, this is not true, as explained in the NAL and as it has previously acknowledged.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that Headliner Radio, Inc., licensee of Radio Station KSXY-FM (formerly KFIG-FM), Fresno, CA, FORFEIT to the United States of America three thousand, one hundred twenty five dollars ($3,125) for its violation of Section 73.1216 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 26, 1993

Released: April 30, 1993

CERTIFIED-MAIL RETURN RECEIPT REQUESTED

Ed Stokes, President	8310-HTS
Stokes Communications Corporation	92070775
Licensee, Radio Station WWWT(AM)	92090497
P.O. Box 249	
Randolph Center, VT 05061	

Dear Mr. Stokes:

This letter constitutes a Notice of Apparent Liability for a forfeiture of twenty thousand dollars ($20,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended. This action is taken under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On July 28, 1992, the Commission received a complaint alleging that Stokes Communications Corporation, licensee of Radio Station WWWT(AM), Randolph, Vermont, was violating Section 73.1745(a) of the Commission's Rules, which requires licensees to operate according to their license terms. The complainant alleged that the license terms required you to reduce operating power at night to 66 watts, but that you were operating at full daytime power, 1000 watts, during nighttime hours. On August 28, 1992, the Commission sent you a letter of inquiry concerning the alleged violation.

In your response, dated September 8, 1992, you admitted that you used the same power (one kilowatt) during the day and at night. This means that you operated during nighttime hours at power levels in excess of those permitted by the terms of your license, which require you to reduce your power to 66 watts at night. You claimed that your software, which you contended was used to change the transmitter's operation from one power level to another, was faulty and, although you thought your chief engineer was updating the software to monitor the field strength and power at night, you were mistaken. You stated that you were unsure of when you began operating in violation of your license terms, but assured us that the problem has been corrected.

In a letter dated February 3, 1993, responding to a telephone request for more complete information in response to our initial letter of inquiry, you informed us that you could not provide data reflecting the actual power used from May 1992 to September 1992, as requested by the initial letter of inquiry. You stated that you believed the station was running at 1000 watts, twenty-four hours a day. You, however, requested that we consider your record of compliance with the Commission's Rules in making our determination regarding the alleged violation.

After reviewing the record, we find that you operated at a power level at night in excess of that permitted by your license terms in repeated violation of Section 73.1745(a) of the Commission's Rules. The complaint alleged that you have been in violation since September 1991. You expressed uncertainty as to how long you have been in violation of this rule but admitted that it was from May 1992. Thus, it appears you repeatedly violated Section 73.1745(a) from, at least, May 1992 to September 8, 1992. Accordingly, you are advised of your apparent liability for a forfeiture of twenty thousand dollars ($20,000) for your apparent repeated violations of Section 73.1745(a) of the Commission's Rules. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *on recon.*, 7 FCC Rcd 5339 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992). Under these standards, twelve thousand, five hundred dollars ($12,500) is the base forfeiture amount for a violation of Section 73.1745(a). We increased the forfeiture because the violation was repeated, but decreased it because of your overall record of compliance with the Commission's Rules. Therefore, we find that a forfeiture for twenty thousand dollars ($20,000) is appropriate.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 27, 1993

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMERITECH'S PETITION FOR DECLARATORY RULING AND RELATED WAIVERS TO ESTABLISH A NEW REGULATORY MODEL FOR THE AMERITECH REGION

On March 1, 1993, Ameritech filed a petition seeking a declaratory ruling and related waivers to establish a new regulatory model designed specifically for its five-state region. Ameritech proposes to restructure the way it interconnects with competitors' networks pursuant to its "Customers First: Ameritech's Advanced Universal Access Plan" (Plan). Ameritech describes advanced universal access as providing for an infrastructure of interconnected public and private networks offering affordable access to full motion video, data, and voice communications to every home and business. Ameritech states that the Plan will facilitate the delivery of advanced telecommunications services to customers by accelerating competition, stimulating innovation, and encouraging the more efficient provision of services. Ameritech states, however, that advanced universal access requires major changes in regulatory policy.

Ameritech states that its Plan for interconnection to the Ameritech network will unbundle local loops, local switching, dedicated transport, common transport, Signalling System 7 call setup, and local numbering. Ameritech states that under its Plan competitors will be able to provide, or procure from third parties, any facility or function they require. Ameritech also states that its Plan insures reasonable economic arrangements between Ameritech and other providers, and guarantees non-discrimination in provisioning and maintenance.

In conjunction with this, Ameritech requests the Commission to issue a declaratory ruling that its provision of interexchange services as proposed in its Plan is in the public interest and that the Plan's provisions adequately address the issues of cross-subsidization and discrimination. Ameritech adds that it intends to file with the Department of Justice a request for waiver of the Consent Decree seeking authority to enter the interexchange market. Ameritech states that, in addition to the relief requested in its petition, Ameritech intends to vigorously pursue the elimination of the cable television cross-ownership prohibition.

In addition, Ameritech seeks waivers of various Commission regulations to reflect the new market conditions resulting from its Plan. For example, Ameritech seeks a waiver of rules relating to pricing bands and floors, price deaveraging, competitive response pricing, and customer service offerings. Ameritech also requests that the Commission remove pricing subsidies designed to achieve social goals from competitive service rates and allow Ameritech to recoup these subsidies in a manner that is competitively neutral.

Ameritech states that it developed the Plan because technological advances in the industry make it possible for many large firms to provide competitive alternatives to Ameritech's services. For example, Ameritech states that interexchange carriers (IXCs) are increasingly bypassing the local exchange carriers. Ameritech adds that competitive access providers are able to provide access alternatives to customers in its region. Ameritech also states that IXCs are able to package, at one price, long distance and interLATA 800 services for customers and that this has contributed to a dramatic decrease in Ameritech's provision of 800 service.

On April 16, 1993, Ameritech filed a voluminous supplement to its initial petition. In its supplemental filing, Ameritech provides studies and reports supporting its request for unbundling and interconnection arrangements and accelerated inter-LATA relief. Ameritech also provides technical specifications, model tariffs, and economic data as well as descriptions of the regulatory reforms and safeguards that support its Plan.

Interested parties should file comments on the petition by **June 11, 1993,** and reply comments by **July 12, 1993,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Three copies should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. An additional copy should be sent to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of the Cable Television Consumer Protection and Competition Act of 1992 — **MM Docket No. 92-259**

Broadcast Signal Carriage Issues

Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates — **MM Docket No. 90-4**

Request by TV 14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market — **MM Docket No. 92-295** RM-8016

REPORT AND ORDER

Adopted: March 11, 1993; Released: March 29, 1993

By the Commission: Commissioner Marshall not participating.

Table of Contents

	Paragraph
I. INTRODUCTION	1
II. MUST-CARRY REGULATIONS	3
A. Carriage of Local Noncommercial Educational Television Stations	3
1. Definition of Qualified Local NCE Station	3
2. Signal Carriage Obligations	11
B. Carriage of Local Commercial Television Stations	26
1. General Signal Carriage Requirements	26
2. Definition of a Television Market	37
3. Selection of Signals	55
4. Low Power Television Stations	62
5. Sales Presentations and Program Length Commercials	72
C. Manner of Carriage Provisions Applicable to Commercial and Noncommercial Stations	75
1. Content to be Carried	75
2. Channel Positioning	83
3. Signal Quality	92
D. Procedural Requirements	105
1. Notification Regarding Deletion or Repositioning of Channels	105
2. Compensation for Carriage	111
3. Remedies	115
III. RETRANSMISSION CONSENT	129
A. Definitional Issues	130
B. The Scope of Retransmission Consent	137
1. Radio	138
2. Low Power Television Stations	140
3. Exceptions to the Retransmission Consent Requirement	141
4. Distant Non-superstations and Foreign Stations	148
C. Implementing Retransmission Consent	149
1. Must-Carry/Retransmission Consent Election and Implementation	150
2. The Default election Procedure	158
3. Other Matters	160
D. Retransmission Consent and Section 164	164
E. Retransmission Consent Contracts	172
F. Reasonableness of Rates	176
G. Other Matters	179
IV. ADMINISTRATIVE MATTERS	182

I. INTRODUCTION

1. By this *Report and Order*, the Commission adopts the rules needed to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992" or "1992 Act").[1]

2. On November 5, 1992, the Commission adopted a *Notice of Proposed Rule Making* ("*Notice*") in this proceeding to consider two provisions of the Cable Act of 1992 concerning the carriage of broadcast signals by cable television systems and other "multichannel video programming

[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

distributors".[2] The first of these, set forth in Sections 4 and 5 of the 1992 Act, concerns mandatory signal carriage ("must-carry") rights of commercial and noncommercial television broadcasting stations that are "local" to the area served by a cable system.[3] The second provision, set forth in Section 6 of the 1992 Act, is one that prohibits cable operators and other multichannel video programming distributors from carrying the signals of broadcast stations without first obtaining their consent in certain circumstances. While each of the provisions is distinct and functions in a separate fashion, they are related in that, with respect to local cable carriage, for example, television broadcasters on a system-by-system basis must make a choice once every three years whether to proceed under the mandatory carriage rules or to govern their relationship with cable operators by the retransmission consent requirement. The Commission decided to address these two matters in a single *Notice* based primarily on administrative convenience and not because it believed that the matters are not severable.[4]

II. MUST-CARRY REGULATIONS

A. Carriage of Local Noncommercial Educational Television Stations

1. Definition of Qualified Local NCE Station

3. Section 5 of the Cable Act of 1992 adds a new Section 615 to the Communications Act of 1934, as amended.[5] Under Section 6150 of the 1992 Act, a local noncommercial educational (NCE) station qualifies for must-carry rights if it is licensed by the Commission as an NCE station and if it is owned and operated by a public agency, nonprofit foundation, or corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting.[6] An NCE station is also considered qualified if it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. In the *Notice*, we sought comment on various aspects of the definition of a qualified local NCE station. This section first will address the criteria for determining whether a municipal NCE station transmits predominantly noncommercial programs for educational purposes. We will then examine whether stations or translators operating on channels other than those reserved for NCE use should be granted NCE status. Finally, to determine whether a particular NCE station is "local" to a given cable system for purposes of Section 5 of the 1992 Act, we will discuss establishment of a "principal headend" for cable systems with multiple headend facilities.

4. *Municipally-owned Stations.* The Commission proposed in the *Notice* that a municipally-owned station will be deemed to transmit predominantly noncommercial programming for educational purposes if it broadcasts such programming, as it is defined in Section 73.621 of the Commission's rules, for at least 50 percent of its broadcast week.[7] Commenters addressing this issue tend to agree with the 50 percent standard but believe programming should be evaluated on other than a weekly basis. For example, the Association of America's Public Television Stations (APTS) and TKR Cable (TKR) believe that programming should be measured in terms of broadcast hours, with APTS suggesting a time frame of 6 AM to midnight.[8] The Consumer Federation of America and the Media Access Project (CFA/MAP) recommends that the Commission review audience ratings and demographic data to establish the primary hours of viewing, generally and for specialized audiences, and mandate that 50 percent of that time period per day be devoted to NCE programs.[9] WNYC Communications Group (WNYC), a municipally-owned NCE station, agrees with the Commission's proposal.[10]

5. We will adopt the definition proposed in the *Notice*. While two commenters, International Family Entertainment (IFE) and Newhouse, believe that the 50 percent

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[2] *Notice of Proposed Rule Making* in MM Docket No. 92-259, 7 FCC Rcd 8055 (1992). The Commission received 82 comments and 46 replies in response to the *Notice*. A list of commenters is contained in Appendix A. We accept the late-filed reply comments of Major League Baseball and Satellite Broadcasting and Communications Association.

[3] The Commission's pending *Second Further Notice of Proposed Rule Making* in MM Docket No. 90-4 requested comment on the adoption of must-carry rules in conjunction with the effective competition standard. *See* 6 FCC Rcd 4545 (1991). We terminate that proceeding here in light of the must-carry provisions of the 1992 Cable Act.

[4] On December 23, 1992, a three-judge court of the U.S. District Court for the District of Columbia held that it will hear only constitutional challenges to the must-carry rules pursuant to Section 23 of the Cable Act of 1992, which provides that challenges to the constitutionality of Sections 4 and 5 shall be heard by a district court of three judges. *Turner Broadcasting Systems, Inc. v. Federal Communications Commission*, No. 92 Civ. 2247 (D. D.C. Dec. 23, 1992). Thus, constitutional challenges to the retransmission consent and other provisions of the 1992 Act will be considered separately. Several commenters address the constitutionality of the 1992 Act's must-carry and retransmission consent provisions. *See, e.g.*, Turner Broadcasting System (Turner), Discovery Communications (Discovery), Time Warner Entertainment Company (Time Warner). As these matters are currently under court review, we will not address them here.

[5] The statutory must-carry requirements for NCE stations became effective on December 4, 1992, the general effective date of the Cable Act of 1992. On December 9, 1992, the U.S. District Court for the District of Columbia issued a "Standstill Order" that contemplates that during the pendency of the District Court case the Commission will take the full 120 days permitted under the statute (*see* Section 615(j)(3)) to resolve any complaint filed by an NCE station. *Turner Broadcasting Systems, Inc. v. Federal Communications Commission*, C.A. Nos. 92-2247, *et al.* (D. D.C. Dec. 9, 1992).

[6] Section 615(l)(1)(A). Alpha-Omega Broadcasting of Albuquerque (Alpha-Omega) is concerned that the *Notice* refers to NCE eligibility without incorporating the formula for determining whether a station is eligible for a community service grant from the Corporation for Public Broadcasting in Section 396(k)(6)(B) of the Communications Act of 1934, as amended. Alpha-Omega Comments at 4-7. It is not our intention to undermine these established criteria, and the rule has been written accordingly. *See* Appendix C.

[7] *Notice* at 8056-57. As Newhouse Broadcasting Corporation (Newhouse) correctly suggests, the *Notice* did not intend to limit the scope of "educational purposes" only to the requirements of paragraph (a) of Section 73.621, but intended that all of Section 73.621 would be governed by that definition. Newhouse Comments at 27. The new rule has been written accordingly. *See* Appendix C.

[8] APTS Comments at 6-7; APTS Reply at 1-2; TKR Comments at 2.

[9] CFA/MAP Comments at 5-6.

[10] WNYC Comments at 3-4; WNYC Reply at 3-4.

standard is inadequate,[11] we find that the standard clearly reflects Congressional intent, as indicated in the legislative history, and these parties offer no evidence to the contrary. The House Report indicates that body's understanding that a municipal station transmits predominantly noncommercial programs for educational purposes if "more than one half of a station's programming is noncommercial programming for educational purposes, as measured in broadcast hours."[12] Further, we do not agree with APTS and TKR that the reference to "broadcast hours" in the House Report means that the amount of NCE programming must be measured on a daily basis rather than on a weekly basis.[13] Rather, we believe that the House Report referred to the calculation of "broadcast hours" as an alternative to counting the number of educational programs without regard to length or some other measurement. We prefer a weekly measurement to give municipally-owned NCE stations maximum flexibility in developing their programming schedules. We also believe that the 50 percent of programming threshold is an adequate safeguard to ensure that such stations cannot relegate their NCE programming to undesirable hours.

6. *Stations and Translators on Non-NCE Channels.* Section 615(l) of the 1992 Cable Act provides that the definition of a qualified local NCE station should include the translator of any NCE station with five watts or higher power serving the franchise area, a full-service station or translator licensed to a channel reserved for noncommercial educational use, and such stations and translators operating on channels not so reserved as the Commission determines are qualified NCE stations.[14] We asked in the *Notice* if the Commission should grant NCE status to stations or translators operating on channels other than those reserved for noncommercial educational use.[15] Public television interests generally agree that such stations should be considered qualified NCE stations if they meet all applicable criteria as established in the 1992 Cable Act.[16] Cable commenters urge the Commission to make a public interest determination on a case-by-case basis.[17] We conclude that stations and translators on non-NCE channels will be considered qualified if they meet the qualification criteria set forth in Section 5 of the 1992 Cable Act, which are delineated at paragraph 3, *supra*. These criteria are quite exhaustive and will ensure that stations on non-NCE channels asserting NCE must-carry rights are truly operating as NCE stations.

7. *Headends.* Section 615(l)(2) of the 1992 Act defines a local NCE station as an NCE station licensed to a principal community with a reference point, as defined in Section 76.53 of the Commission's rules,[18] within 50 miles of the principal headend of the cable system, or with a Grade B service contour, as defined in Section 73.683(a) of the Commission's rules, that encompasses the principal headend of the cable system. The *Notice* proposed that a cable operator with multiple headend facilities, any of which could be considered the "principal headend," should be permitted to select which of those headends will serve as its principal headend, as long as the choice is not intended to circumvent the system's must-carry obligations.[19] Most commenters addressing this issue agree with the Commission's proposal and note that an operator's principal headend may change as its system is reconfigured.[20] On the other hand, APTS believes that the principal headend should be the headend serving the largest number of subscribers or accommodating the majority of the signal processing equipment.[21] WNYC also disagrees with the *Notice* and suggests that the headend that is closest to the designated reference point of the community of license of a qualified NCE station is the principal headend for that station.[22] NCTA disagrees, arguing that this would essentially nullify the principal headend requirement, as virtually all NCE stations would be afforded must-carry status.[23]

8. With respect to procedural requirements, Adelphia, Newhouse and Time Warner submit that the designation of a cable operator's principal headend could be included on an amended Form 320, the annually-filed Basic Signal Leakage Performance Report.[24] Armstrong suggests that notice of the designation of the principal headend be placed in the operator's public file and that if a change becomes necessary, the operator should be able to designate a different headend upon 30 days' prior notice to must-carry stations on the system.[25] NCTA does not object to including

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[11] IFE Comments at 4-5; Newhouse Comments at 27.

[12] *See* House Committee on Energy and Commerce, H.R. Rep. No. 623 ("House Report"), 102d Cong., 2nd Sess. (1992) at 104.

[13] *See* APTS Comments at 6-7; TKR Comments at 2.

[14] With respect to other issues regarding translators, commenters ask the Commission to clarify that NCE status should be permitted for translators of NCE parent stations, that a cable system should be permitted to carry a translator in lieu of a primary signal, that a system should not be required to carry both a parent station and its translator, and that the same channel positioning requirements that would apply to a primary station should apply to its translator. *See* Adelphia Communications Corporation *et al.* (Adelphia) Comments at 4; Time Warner Comments at 5; APTS Reply at 10 n.10. We believe it consistent with the legislative history of the 1992 Cable Act to conclude that a translator may be carried in lieu of a primary NCE signal, and that it should be afforded the same must-carry status as the primary signal, including rights to the primary station's channel number, as long as that translator operates with five watts or higher power, serves the cable system's franchise area and the parent station is within 50 miles of the principal headend of the cable system. *See* House Report at 104. Further, carriage of both a primary station and its translator will not be required, since the programming on the two signals will be substantially duplicative.

[15] *Notice* at 8057.

[16] APTS Comments at 8; APTS Reply at 3-4; Educational Broadcasting Corporation (EBC) Comments at 1-2, 5-6; National Association of College Broadcasters (NACB) Comments at 2; WNYC Reply at 2.

[17] National Cable Television Association (NCTA) Comments at 4 n.5; Adelphia Comments at 4; Time Warner Comments at 5-6.

[18] Adelphia and Time Warner propose that the Commission add some communities and reference points to Section 76.53 so as to supply the coordinates for every community where an NCE station is located. Adelphia Comments at 5; Time Warner Comments at 7. We decline to do so at this time. We note that Section 76.53 provides that where a community's reference point is not given, the coordinates of the main post office in the community shall be used.

[19] *Notice* at 8057.

[20] Adelphia Comments at 5; Armstrong Utilities (Armstrong) Comments at 2-3; Continental Cablevision (Continental) Comments at 3-5; InterMedia Partners (InterMedia) Reply at 2-3; NCTA Comments at 4; Newhouse Comments at 28; Time Warner Comments at 6-7; TKR Comments at 3.

[21] APTS Comments at 10; APTS Reply at 6-7.

[22] WNYC Comments at 6-9; WNYC Reply at 5-6.

[23] NCTA Reply at 3 n.2.

[24] Adelphia Comments at 5; Newhouse Comments at 28; Time Warner Comments at 6-7.

[25] Armstrong Comments at 2-3.

principal headend designations in operators' public files and notifying stations and the Commission of those designations, but does not believe that an operator should have to inform the Commission when it changes its headend.[26] APTS proposes that cable systems be required to notify the Commission and local NCE stations of their principal headend designations and supports a public file requirement. APTS further urges the Commission to issue a public notice listing the principal headend designated by each cable system, and proposes that a cable operator must file a petition with the Commission and serve affected stations in order to change its designation.[27]

9. The term "principal headend" is not defined in the 1992 Cable Act, although we note that the Senate version of the legislation included a definition consistent with the proposal in the *Notice*.[28] We believe that, in many cases, the cable system will have only one headend or, if it has more than one headend, a particular headend will clearly be the principal headend. However, where a system has multiple headends, any one of which could be the principal headend, we believe that Congress intended to allow the system to select its own principal headend, provided that its choice is reasonable and is not made in order to circumvent the must-carry obligations imposed by the 1992 Act. We expect, in light of the record on this issue, that the "principal headend" in the majority of systems will be the headend serving the most subscribers, accommodating the most signal processing equipment, or lying closest to the geographical center of the system. We will consider these factors in evaluating a complaint regarding a cable system's principal headend designation, as noted below. WNYC's proposal that the principal headend be different for different stations would cause confusion and would be inconsistent with the 1992 Cable Act. The plain language of the statute contemplates that a system will have a single principal headend.

10. We will require an operator to designate its principal headend by May 3, 1993, and to make such designation part of its public file on June 17, 1993.[29] Cable operators with more than one headend also must notify all qualified NCE stations by certified mail regarding the location of the designated principal headend on May 3, 1993. In general, a cable operator may change its choice of principal headend only for good cause (*e.g.*, where the system adds communities that necessitate redesignation or relocation of its headend). An operator making any subsequent changes in its principal headend must notify all stations carried on its system pursuant to the must-carry rules at least 60 days before the change takes place, and include the new designation in its public file.[30] In the event that a cable operator abuses its discretion and either selects or manipulates the location of a principal headend for the apparent purpose of avoiding must-carry obligations, an aggrieved NCE station may file a complaint with the Commission to seek carriage on the operator's system. To simplify the complaint process, we will require only that the complaining station provide the Commission with a short statement of facts supporting the station's assertion that the cable operator either initially designated or later moved its principal headend to avoid carrying the station. We believe that the cable system will bear a significant burden in demonstrating the reasonableness of its designation where the principal headend is not the headend serving the majority of the system's population, the headend with the majority of the system's signal processing equipment or the headend closest to the geographical center of the cable system.

2. Signal Carriage Obligations

11. Section 615(b) of the 1992 Cable Act requires cable operators to carry qualified local NCE television stations requesting carriage.[31] Small systems, with 12 or fewer usable activated channels, must carry the signal of one qualified local NCE station, and medium capacity systems, with 13 to 36 usable activated channels, must carry the signal of all qualified local NCE stations up to a total of three. Systems with a capacity of more than 36 usable activated channels are generally required to carry the signals of all qualified local NCE stations requesting carriage. If a small or medium capacity system operates beyond the presence of a qualified local NCE station, it is required to import and carry a qualified NCE station.[32] In addition, Section 615(c) requires that cable operators, regardless of capacity, must continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990, regardless of the proximity of those stations to the system's principal headend. Further, Section 615(h) provides that qualified NCE signals shall be available to every subscriber at all television sets connected to the cable system as part of the cable system's lowest priced service tier that includes the retransmission of local commercial television broadcast signals.

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[26] NCTA Comments at 5 n.7; NCTA Reply at 3-4, 4 n.4.

[27] APTS Comments at 10-13.

[28] *See* Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92 ("Senate Report"), 102d Cong., 1st Sess. (1991) at 101.

[29] This requirement will apply to all cable systems and will be included in a new Section 76.302 of our rules that specifies the records relating to must-carry obligations that must be maintained in the system's public file.

[30] This requirement includes notification of commercial as well as NCE stations.

[31] The NCE must-carry rules became effective on December 4, 1992. Thus, cable operators should already be carrying the number of qualified NCE stations required under Section 615 of the 1992 Act. However, under our new regulations adopted herein, by June 2, 1993, a cable operator will be required to send a list of all broadcast television signals carried on the cable system, and their channel positions, by certified mail to all local broadcast stations, including those not designated as must-carry signals and those not carried on the system. Sections 615(g)(4) and (i)(2) provide that a cable operator is not required to carry an otherwise qualified NCE station if it fails to deliver a good quality signal to the cable system's principal headend or would increase the cable system's copyright liability. To the extent these signal quality problems or copyright liability matters have not already been resolved, on May 3, 1993, a cable operator will be required to notify by certified mail those local NCE stations that may not be entitled to carriage because they either (1) fail to meet the signal strength requirements or (2) may cause increased copyright liability to the cable system.

[32] Section 615(b)(2)(B)(iii) provides that a small capacity cable system without sufficient channel capacity to comply with this importing requirement will not be required to remove any programming service provided to subscribers as of March 29, 1990, but must use the first channel that subsequently becomes available. The 1992 Act includes no similar provision for medium capacity systems.

12. In the *Notice*, we sought comment on a number of specific issues regarding a cable operator's NCE signal carriage obligations. This section will first discuss the definition of "activated channels" for purposes of the 1992 Cable Act. Next, we will address how operators are to select among requests for carriage if those requests exceed their mandatory carriage obligations. We will then determine when an NCE signal is "substantially duplicated" for purposes of certain limited exceptions to the must-carry provisions of the 1992 Cable Act. Finally, we will discuss issues regarding use of public, educational or governmental channels for carriage of NCE stations, and identification of NCE must-carry signals.[33]

13. *Activated Channels.* The 1992 Cable Act defines "activated channels" as "channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use." The statute defines "usable activated channels" as "activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as defined by the Commission."[34] We proposed in the *Notice* to add these definitions to Section 76.5 of the Commission's rules.[35] We received no objection to incorporating these definitions into our rules and we thus will do so. Acton Corp. *et al.* (Acton), and NCTA request further clarification, however. Acton submits that the definition should include only channels that can be delivered to subscribers without additional equipment and expense; that is, it should not include premium or pay-per-view channels that require special converters or other equipment in order to be received by individual subscribers.[36] We believe, however, that such a qualification would be contrary to the plain language of the statute, which even counts channels that are not currently used to provide service to subscribers. NCTA asserts that an operator that has designed a system with bandwidth greater than the number of video carriers generated should not have increased signal carriage obligations.[37] We intend to count only channels engineered at the headend, so if a system is theoretically capable of providing, for example, 40 channels but only has equipment at the headend to carry 30 channels, it will be considered to have 30 activated channels.[38]

14. *Selection of Signals.* As noted above, small capacity cable systems are required to carry one qualified local NCE station and medium capacity cable systems are required to carry no more than three qualified local NCE stations. The *Notice* proposed that if a small or medium capacity system receives multiple requests for carriage that outnumber its must-carry obligations, it will have discretion to select the NCE stations it will carry. Armstrong and CFA/MAP agree that cable operators should be permitted to choose among NCE requests in these situations.[39] CFA/MAP additionally suggests, however, that cable systems be required to first select from among those requests made by NCE stations licensed as noncommercial broadcasters.[40] APTS, on the other hand, disagrees with the *Notice* and suggests that cable operators faced with requests in excess of their obligations should be required to carry the in-state station that is most local, unless the NCE stations involved agree otherwise.[41]

15. We conclude that if a cable system receives requests for carriage of qualified local NCE stations in excess of its must-carry obligations, the cable system may select which signals to carry. We do not believe that cable operators will abuse this discretion, and we note that the statute prohibits cable operators from accepting consideration for carriage of NCE stations.[42] We expect that cable system operators will be naturally inclined to carry the NCE stations that are of most interest in their service area, or, in the case of multiple stations, those that provide some degree of diversity. Since the 1992 Act appears to show no priority to carriage for licensed NCE stations *vis-a-vis* municipally-owned stations, we will not, as CFA/MAP suggests, mandate preferences among the types of NCE stations a cable operator may choose in fulfilling its must-carry obligations. The APTS proposal would be difficult to implement and would not necessarily ensure the best service to the public. While the Commission might be able to determine which station is "most local" with respect to a particular cable system, mandatory carriage of that station rather than another local station will not necessarily always serve the public interest. We note that our conclusion regarding this issue will not

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[33] We note that the carriage obligations imposed by the 1992 Cable Act generally do not conflict with existing Commission rules. Section 615(f), however, provides that a qualified local NCE television station whose signal is carried by a cable system "shall not assert any network nonduplication rights it may have pursuant to [S]ection 76.92 [of the Commission's rules] . . . to require the deletion of programs aired on other qualified local noncommercial educational television stations whose signals are carried by that operator." Thus, as between qualified local NCE stations, no network nonduplication requirements will be enforced once the NCE must-carry rules become effective. Section 76.92 of the rules will be amended accordingly.

[34] These definitions are included in Sections 2(c)(5) and 2(c)(7) of the 1992 Cable Act, which amend Section 602 of the Communications Act, 47 U.S.C. § 531.

[35] *Notice* at 8057 n.9.

[36] Acton Comments at 20-22.

[37] NCTA Comments at 6-7.

[38] If such a medium capacity system subsequently brings the other channels into use, it will be responsible for the carriage obligations of a large system. *See* Section 615(b)(3)(D).

NCTA further notes that there may be situations where an operator uses a microwave link to deliver only a portion of the system's channels to a separate community. NCTA asserts that the Commission should make clear that a portion of a single system may have a lesser number of activated channels despite the fact that another community on the same system may have a greater number of channels available. NCTA Comments at 6 n.13. We note that if a portion of a cable system has insufficient wiring or microwave capacity to receive the full complement of channels available at the system's principal headend, we will not require the cable operator to upgrade that part of the system. We will resolve other problematic situations when presented with the specific facts of a particular case.

[39] Armstrong Comments at 4; CFA/MAP Comments at 6.

[40] CFA/MAP Comments at 6-7.

[41] APTS Comments at 14-15; APTS Reply at 8-10; *accord* Independence Public Media of Philadelphia (IPM) Reply at 7; *contra* Community Antenna Television Association (CATA) Reply at 7; NCTA Reply at 5-6.

[42] Section 615(i).

relieve cable systems of their obligation to adhere to Section 615(c) regarding continued carriage of existing stations. Moreover, we emphasize that in any event a cable operator may choose to carry NCE signals in excess of the number required by the statute.[43]

16. *Substantial Duplication.* The 1992 Cable Act sets forth limited exceptions to must-carry obligations for medium capacity and large capacity systems. Section 615(b)(3)(C) provides that if a cable operator with 13 through 36 channels carries the signal of a qualified local NCE station that is affiliated with a state public television network, that operator shall not be required to carry the signal of additional local NCE stations affiliated with the same network if the programming of those stations substantially duplicates the programming of the state network station already being carried. Similarly, Section 615(e) provides that systems with more that 36 channels shall not be required to carry the signals of additional local NCE stations if the programming of those stations substantially duplicates the programming of a qualified local NCE station requesting carriage. The *Notice* proposed that for purposes of both exceptions, a station will be deemed to "substantially duplicate" the programming of another station if more than 50 percent of its weekly prime time programming consists of programming aired on the other station.[44]

17. All commenters addressing this issue agree with our proposal that the definition of "substantial duplication" should be the same for the medium capacity system exception and for the large capacity system exception.[45] In addition, cable commenters argue that the duplication should not have to be simultaneous to justify non-carriage of a "substantially duplicating" station,[46] while public television interests and consumer groups contend that the duplication must be simultaneous.[47] Otherwise, the comments vary widely regarding the definition of substantial duplication. For example, NCTA and WNYC agree with the *Notice* that substantial duplication exists if a station duplicates more than 50 percent of another station on a weekly, prime time basis,[48] although IFE and NACB oppose the 50 percent benchmark.[49] Continental supports the 50 percent standard but submits that the Commission should look at the content of a full week's programming rather than just prime time programming,[50] while CFA/MAP believes that the definition should be based on prime time programming.[51] A number of commenters propose a combined approach whereby the Commission would consider the amount of duplication of both overall and prime time programming.[52]

18. Commenters also differ on the length of the comparison period. Acton and TKR agree with the Commission that the test for determining substantial duplication should be one week of programming.[53] Viacom suggests that the comparison be based on the previous calendar month.[54] CFA/MAP proposes a measurement period of four successive weeks.[55] APTS believes that the minimum comparative period should be one representative week in the preceding year, as designated by the Commission.[56] Finally, a number of commenters entirely reject the proposal in the *Notice* and urge the Commission to revert to the definition of substantial duplication in the former must-carry rules, *i.e.*, duplication during 14 weekly prime time hours.[57]

19. For purposes of both the medium capacity system and the large capacity system exception, we conclude that an NCE station does not substantially duplicate the programming of another NCE station if at least 50 percent of its typical weekly programming is distinct from programming on the other station either during prime time or during hours other than prime time. This standard will be applied as a two-part test. First, the amount of duplicative (simultaneous or non-simultaneous) prime time weekly programming broadcast over the course of a three-month period will be calculated. The end of the three-month period must fall within 30 days prior to the date the cable system notifies the NCE station that it is denying or discontinuing carriage based on substantial duplication. Second, the amount of duplicative (simultaneous or non-simultaneous) weekly programming broadcast outside of prime time over the course of the same three-month period will be determined. Only if the station duplicates more than 50 percent of the other station's weekly programming in both of these respects can it be denied carriage.[58] By contrast, if the NCE station broadcasts 50 percent or less duplicated programming on either a prime

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[43] Adelphia notes that Section 614(a) exempts cable systems with 12 or fewer channels and less than 300 subscribers from any commercial must-carry obligations and asserts that the Commission should adopt the same exemption for NCE must-carry. Adelphia Comments at 7 n.3. We find, however, that such an exception would violate the plain language of Section 615(b)(2)(A), which provides that systems with 12 or fewer channels must carry at least one NCE station. Additionally, WNYC asserts that where a qualified local NCE station does not exist at all with respect to a cable system, the Commission should develop guidelines to ensure that the mandatory NCE station the system selects for carriage is devoted to predominantly educational purposes. WNYC Comments at 4-5. We believe that the statute already provides sufficient guidance regarding this issue. *See* Section 615(l)(1), the definition of a qualified NCE station.

[44] *Notice* at 8057.

[45] Adelphia Comments at 5-6; Armstrong Comments at 5; Acton Comments at 15; NCTA Comments at 7; Newhouse Comments at 29; Time Warner Comments at 8; TKR Comments at 3; Viacom International (Viacom) Comments at 64.

[46] Adelphia Comments at 5-6; Armstrong Comments at 5; Black Entertainment Television (BET) Comments at 5; Acton Comments at 15-16; Continental Comments at 13-14; Newhouse Comments at 29; Time Warner Comments at 8-9; TKR Comments at 3-4; Viacom Comments at 64; Viacom Reply at 16-18.

[47] APTS Comments at 19-20; CFA/MAP Comments at 7-10; IPM Reply at 5-6; WNYC Comments at 10; WNYC Reply at 6-7.

[48] NCTA Comments at 7; WNYC Comments at 10.

[49] IFE Comments at 5; NACB Comments at 3.

[50] Continental Comments at 13-14.

[51] CFA/MAP Comments at 7-8.

[52] BET Comments at 5; Acton Comments at 14-15; TKR Comments at 3-4; Trinity Christian Center (Trinity) Comments at 9; Viacom Comments at 63-65. We note that Viacom urges the Commission to adopt a four-hour definition of prime time (7-11 PM, 6-10 PM central) as set forth in the Commission's Prime Time Access Rule, Section 73.662(g). Viacom Comments at 62-63. WNYC suggests a definition of 8-11 PM. WNYC Comments at 10.

[53] Acton Comments at 14-15; TKR Comments at 3-4.

[54] Viacom Comments at 64.

[55] CFA/MAP Comments at 8.

[56] APTS Comments at 19-20.

[57] Adelphia Comments at 5-6; Armstrong Comments at 5; InterMedia Reply at 6; Newhouse Comments at 29; Time Warner Comments at 7-9.

[58] Armstrong points out that a cable system located near a

time or a non-prime time basis, it will not be deemed substantially duplicative of the other station and will be entitled to carriage under our must-carry rules. The cable operator will bear the burden of demonstrating to an NCE station seeking carriage that the station substantially duplicates another NCE must-carry station if the operator denies carriage on this basis.

20. Section 615(e) of the 1992 Cable Act provides that "[s]ubstantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services." We consider the programming broadcast in prime time distinct from the programming broadcast at other times because we believe that prime time often is intended for different purposes and tends to attract different viewers than other dayparts. Therefore, if a station broadcasts a program in prime time that is broadcast on another station during the day, the two broadcasts will not be considered duplicative. Conversely, two broadcasts of the same program aired during the same daypart over the course of a week will be considered duplicative, even if they occur at different times or on different days. While the House Report indicates that substantial duplication is a simultaneous standard with respect to commercial stations,[59] neither the House Report nor the Senate Report mentions a standard for noncommercial stations. We believe that a non-simultaneous, weekly standard is appropriate for NCE stations because, unlike commercial network affiliates, NCE stations often broadcast their PBS network programming at different times.[60] In addition, we believe that the 50 percent benchmark for prime time and non-prime time programming will fulfill the goal of the statute, to encourage distinctive NCE services, without posing any undue hardship on NCE stations.

21. We clarify here, as APTS suggests, that programs in foreign languages (*e.g*, MacNeil/Lehrer in Spanish) are not duplicative of the same programs broadcast in English, as they target different audiences. We will likewise not consider different episodes of the same program duplicative, since not all episodes of a series cover the same subject. For example, the PBS "Nova" series addresses a wide range of topics that appeal to different audiences. We further clarify that we will follow the definition of "prime time" already included in Section 76.5(n) of the Commission's rules (*i.e.*, 5-10 PM in the central time zone and 6-11 PM in all other time zones; stations in mountain time zone may choose either). In addition, we emphasize that the plain language of the statute dictates that the substantial duplication exception does not supersede the requirement to retain stations that were on the system prior to March 29, 1990.[61]

22. *PEG Channels.* Section 615(d) of the 1992 Cable Act provides that a cable operator required to add the signals of qualified local NCE stations to its system may do so by placing such additional stations on unused public, educational or governmental (PEG) channels not in use for their designated purposes, subject to approval by the franchising authority. Pursuant to Section 611 of the Communications Act, the franchising authority determines how much of a cable operator's channel capacity, if any, will be set aside for PEG use.[62] In the *Notice*, we sought comment on what procedures to follow if a channel reserved for PEG programming is used to carry an NCE signal when no other channel capacity exists and a qualified PEG user subsequently demands access.[63] Commenters addressing this issue suggest a number of safeguards to ensure that PEG channels remain dedicated for their intended use, including public notice requirements, reporting requirements and a specific definition of "unused channels."[64]

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state border or a tri-state area might be required to carry substantially duplicative signals of state NCE stations from two or three different states. Armstrong is faced with this situation and, through fiber optics, currently combines three stations with identical programming from three different states on one channel and provides each state educational channel only to the residents of that state. Armstrong suggests that the cable operator be permitted to choose one station as its must-carry signal in this situation. Armstrong further argues that if an operator is located in only one state and two state signals qualify for must-carry status (*i.e.*, one in the home state and one in a neighboring state), the operator should only be required to carry the NCE station in the state where its subscribers reside. Armstrong Comments at 6-7; *contra* WNYC Reply at 8-9. We note, however, that the state public television network exception for medium capacity cable systems included in the 1992 Cable Act only applies to stations that belong to the same state network. Accordingly, a medium capacity cable system in an area with two qualified local NCE stations affiliated with two different state networks must carry both stations. This is true regardless of whether the cable system is located entirely in one state or covers portions of both states, or whether the programming on the stations in question is substantially duplicative.

[59] House Report at 94.

[60] *See e.g.*, APTS Comments at 18-19.

[61] Adelphia and Time Warner argue that if NCE stations carried on March 29, 1990, have since been dropped, the cable operator should be permitted to refuse carriage if the station does not compensate the cable operator for any additional copyright liability or does not deliver a signal of adequate quality. Adelphia Comments at 3-4; Time Warner Comments at 4-5. Section 615(i)(2), which states that stations may be required to pay the cable operator for increased copyright costs, excludes stations not already carried under the provisions of paragraph (c), which in turn requires operators to continue carriage of signals that were carried as of March 29, 1990. In this regard, we will use the effective date of the noncommercial must-carry rules, December 4, 1992, for determining the affected signals. Signals already deleted by that date do not come within this obligation and thus copyright payment could be required. With respect to signal quality, Section 615(i)(1) does not exclude stations carried on the system as of March 29, 1990. Accordingly, any station seeking carriage or already being carried may be required to bear the cost associated with delivering a good quality signal to the principal headend of the cable system, regardless of whether that station had been carried by the cable system prior to March 29, 1990.

[62] Section 611 (d) provides that "[i]n the case of any franchise under which channel capacity is designated [for PEG channels], the franchising authority shall prescribe (1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and (2) rules and procedures under which such permitted use shall cease."

[63] *Notice* at 8058.

[64] *See* APTS Comments at 21-22; Armstrong Comments at 7-8; CFA/MAP Comments at 10-11; City of Palm Desert (Palm Desert) Reply at 5-7; National Association of Telecommunications Officers and Advisors *et al.* (NATOA) Comments at 4-8; New York State Commission on Cable Television Reply at 2-4.

23. We decline to adopt stringent requirements regarding the use of PEG channels for NCE must-carry purposes because we believe that these matters are more appropriately resolved by individual franchising authorities.[65] After reviewing the record, we conclude that adoption of additional PEG channel requirements and procedures here could infringe upon the discretion given to franchising authorities under this section of the 1992 Act and under Section 611 of the Communications Act. We accordingly will defer at this time to the judgment of franchising authorities with respect to the procedures to be used to delineate the rights of must-carry NCE stations and PEG channel users, respectively. We remind cable operators, however, that a franchising authority's refusal to permit the use of PEG channels for NCE must-carry signals does not relieve a cable system of its must-carry obligations (*i.e.*, a cable operator without a sufficient number of available channels may be required to drop a non-must-carry station or cable programming service to fulfill its must-carry obligations).

24. *Identification of Signals.* Section 615(k) of the 1992 Act requires a cable operator, upon request by any person, to identify the NCE signals carried on its system in fulfillment of must-carry requirements. The *Notice* sought comment on whether a cable operator should be required to provide this information in writing and whether we should require a response within a specified time period. The *Notice* also asked whether we should require a cable operator to retain a current list in its public file of all stations carried on its system pursuant to the must-carry rules.[66] Most commenters addressing this issue agree that operators should be required to retain a list of must-carry stations in their public files.[67] Time Warner and TKR, however, believe that such a requirement would be overly burdensome.[68] In addition, most commenters agree that there should be some requirement that a cable operator respond in writing to a request for a list of must-carry signals carried on its system.[69] For example, APTS proposes procedures for answering such requests, including a requirement that the operator respond within 10 days.[70] CFA/MAP and Fairfax County suggest a response time of no more than 30 days.[71] TKR asserts that in no event should the cable operator be given less than 45 days to respond to any such request.[72]

25. We will require that, by June 17, 1993, a cable operator shall include in its public file a current list of the NCE stations carried on its system pursuant to must-carry requirements. The list should state the call sign, community of license, broadcast channel number and cable channel position on the system for each must-carry station, and should state whether the station was carried on the cable system on March 29, 1990. We do not believe that inclusion of this readily available information in a cable system's public file unduly burdens the cable operator. We also will require that this list must be provided in writing within 30 days in response to a written inquiry. We believe that 30 days is more than adequate time to photocopy and mail the list, which already is included in the public file.

B. Carriage of Local Commercial Television Stations

1. General Signal Carriage Requirements

26. *Signal Carriage Obligations.* A new Section 614 of the Communications Act of 1934, as amended, is established by Section 4 of the 1992 Act.[73] Section 614(a) requires each cable operator to carry local commercial television stations and qualified low power stations.[74] Section 614(b) specifies the number of commercial must-carry signals that each cable operator must provide based on its system channel capacity.[75] In particular, it provides that a cable system with 12 or fewer usable activated channels must carry the signals of at least three local commercial television stations.[76] Such cable systems are exempt from the commercial must-carry requirements if they serve 300 or fewer subscribers, as long as they do not delete from carriage any signal of a broadcast television station.[77] A cable system with more than 12 usable activated channels, regardless of the number of subscribers, must carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.[78] The carriage of other broadcast television signals is at the discretion of the cable operator, subject to retransmission consent, as discussed below in Section III.

27. The Cable Act of 1992 gives the Commission minimal discretion in implementing the general must-carry obligation provisions. A few commenters, however, state their support for our proposal to codify these requirements in our rules.[79] Under the rules we adopt herein, cable

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[65] A related issue arises with respect to carriage of low power television (LPTV) stations. We believe the same conclusions are equally applicable to LPTV carriage on PEG channels.

[66] *Notice* at 8058.

[67] Adelphia Comments at 6; APTS Comments at 23-24; Armstrong Comments at 8; Palm Desert Reply at 8-9; CFA/MAP Comments at 12; Fairfax County Reply at 5-6; WNYC Comments at 11-14.

[68] Time Warner Comments at 9-11; TKR Comments at 4.

[69] APTS Comments at 23-24; CFA/MAP Comments at 12; NCTA Comments at 8.

[70] APTS Comments at 23-24.

[71] CFA/MAP Comments at 12; Fairfax County Reply at 5-6.

[72] TKR Comments at 4.

[73] Section 614(f) requires the Commission to issue the regulations implementing this section within 180 days of enactment.

[74] The definition of a qualified low power television station and the must-carry rights of such signals are discussed separately below.

[75] Section 4 also provides that no cable operator shall be required to provide or make available any "input selector switch as defined in section 76.5(mm)" of the Commission's rules or provide information to subscribers regarding such switch. Accordingly, we will delete Section 76.66 of our rules, 47 C.F.R. § 76.66, in this proceeding. *See* Appendix C.

[76] The same definition of "usable activated channels" will apply for commercial and NCE stations. *See* para. 13 *supra*.

[77] Section 614(b)(1)(A).

[78] Section 614(b)(1)(B). In calculating the number of channels that represent one third of the system's usable activated channels, cable operators may round the result to the nearest whole number. For example, a cable system with 16 such channels need only set aside 5 channels (*i.e.*, 5.33 rounded to the nearest whole number) and a system with 17 channels must carry up to 6 must-carry signals (*i.e.*, 5.67 to the nearest whole number). We also note that the number of channels that must be set aside for commercial must-carry signals are in addition to those that must be set aside for NCE must-carry obligations.

[79] Acton Comments at 3; Tele-Communications, Inc. (TCI) Comments at 3; Golden Orange Broadcasting (Golden Orange) Comments at 2; Trinity Comments at 3. In addition, the New England Telephone and Telegraph Company and New York

operators will be required to begin carriage of their complement of commercial must-carry signals no later than June 2, 1993. With respect to the small system exemption, the National Association of Broadcasters (NAB) suggests that October 5, 1992, be used to determine the carriage obligations of a system with fewer than 300 subscribers since a later date might allow a small system to drop a signal it has historically carried.[80] The new rules will include the signal carriage obligations as set forth in the statute. In addition, we concur with NAB that October 5, 1992, the date this Act was enacted, is an appropriate date for judging whether a system is generally exempt from these must-carry obligations. Thus, a system with 12 or fewer channels and 300 or fewer subscribers need only carry those broadcast stations that it carried on that date.

28. *Definition of a Local Commercial Television Station.* For purposes of these must-carry obligations a "local commercial television station" is defined in Section 614(h)(1)(A) of the 1992 Act as any full power commercial television broadcast station licensed by the Commission that is located in the same television market as the cable system. The term local commercial television station does not include: (1) low power television stations, television translator stations, or passive repeaters; (2) a television broadcast station that would be considered a distant signal under Section 111 of the Copyright Act,[81] unless such station agrees to indemnify the cable operator for any copyright liability resulting from carriage on the cable system; or (3) a television broadcast station that does not deliver to the principal headend[82] of a cable system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, unless such station agrees to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

29. Few commenters addressed this definition other than to concur that it should be included in our rules.[83] However, Adelphia and Time Warner request an interpretation of this definition that would permit the carriage of a local translator, in lieu of a more distant parent station, thereby eliminating the parent's must-carry rights and, possibly, the need for copyright indemnification.[84] Similarly, Pulitzer seeks the right to designate whether its parent or satellite station is requesting must-carry status.[85] In addition, NAB also urges that each cable operator be required to file a certification with the Commission that would be served on each station eligible for must-carry status, within 60 days of the effective date of these rules. The certification would indicate the number of usable activated channels on the system, whether the system has fewer than 300 subscribers, and the call signs of stations it is carrying in fulfillment of its must-carry obligations.[86] NCTA rejects NAB's proposal regarding notification of eligible stations as an additional burden not required by the 1992 Act.[87]

30. First, we note that the statutory definition of a local commercial television station entitled to must-carry rights is very specific. The 1992 Act gives the Commission little discretion regarding its implementation and we will add it as written to our rules. Satellite stations meet this definition and, therefore, are entitled to carriage as must-carry stations. Thus, we do not believe it is appropriate to treat such stations any differently than other must-carry stations with respect to the must-carry/retransmission consent election process or any other provisions regarding must-carry rights.[88] However, Section 614(h) specifically excludes translators from the definition of a local commercial station. Accordingly, we cannot permit a parent station to confer its must-carry rights on a translator retransmitting its signal. However, we believe that a parent station otherwise qualified for must-carry purposes may use a translator to deliver a good quality signal to the cable operator's principal headend, just as it is entitled to use a microwave link for this purpose, or where permitted under copyright law, to employ a translator to eliminate the need for indemnification of copyright liability.[89]

31. While we reject NAB's specific proposal to require cable operators to notify the Commission and all potential must-carry stations of such status, we will require cable operators to notify by certified mail by May 3, 1993, those local signals that may not be entitled to carriage because they either (1) fail to meet the signal strength requirement or (2) may cause increased copyright liability. We are aware that in some cases, especially in fringe areas of a television market, a cable operator may be in a better position than the broadcaster to know whether the quality of the signal delivered to the cable system's principal headend meets the specified standard or whether carriage would result in copyright liability. In addition, on the date that cable systems begin carrying their complement of commercial must-carry signals (June 2, 1993), cable operators will be required to send by certified mail to all local broadcast stations a list of all broadcast television stations carried by the system and their channel positions. This

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Telephone Company (NYNEX) seeks clarification that these provisions do not apply to video dialtone providers and that they are not liable for the failure of their program customers to comply. NYNEX Comments at 3-4. We believe that NYNEX is correct in its interpretation that video dialtone providers are not cable operators, pursuant to our video dialtone decision, and thus are not covered by Sections 4 and 5 of the 1992 Act. *See Memorandum Opinion and Order on Reconsideration* in CC Docket No. 87-266, 7 FCC Rcd 5069 (1992).

[80] NAB Comments at 2.

[81] 17 U.S.C. § 111. Generally stated, a distant signal under that provision is a broadcast station that could not insist upon cable carriage under the Commission's must-carry rules in effect on April 15, 1976.

[82] For purposes of must-carry requirements for carriage of commercial stations, a cable operator must use the same principal headend that has been designated for determining NCE signal carriage requirements. *See* paras. 9-10 *supra*.

[83] Section 614(h)(1)(B). Indemnification for copyright and the costs of signal delivery are addressed below.

[84] Adelphia Comments at 21; Time Warner Comments at 30. Time Warner states that in no instance should a cable operator be required to carry both a station and its translator. *Id.*

[85] Pulitzer Broadcasting Company (Pulitzer) Reply at 6.

[86] NAB Comments at 3-4; Nationwide Communications (Nationwide) states that cable operators should be required to notify stations eligible for must-carry status. Nationwide Comments at 3-4.

[87] NCTA Reply at 7-8.

[88] As discussed below, cable systems are not required to carry duplicative signals. Thus, a cable system is unlikely to be required to carry both a parent station and its satellite.

[89] *See* para. 104, *infra*.

notification must be sent to all local television stations, including those not designated as must-carry signals and those not carried on the system.

32. *Availability and Identification of Must-Carry Signals.* Section 614(b)(7) of the 1992 Act provides that all must-carry signals shall be provided to every subscriber of a cable system and shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide such connections, or the equipment and materials for such connections, the operator must notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box. In such cases, the cable operator shall offer to sell or lease a converter box to such subscribers at rates in accordance with the standards established by the Commission for equipment needed to receive basic cable service pursuant to Section 623(b)(3).[90] Moreover, upon request by any person, cable operators are required to identify those signals it carries to comply with the must-carry requirements, according to Section 614(b)(8).

33. In response to the questions in the *Notice* about the statutory requirements to make all must-carry signals available to all subscribers and all cable-connected television sets, Continental seeks an exemption for commercial subscribers (*e.g.*, hotels, hospitals) that receive specially designed channel line-ups.[91] With respect to notification to subscribers for the need for converters, NAB recommends that we adopt a requirement similar to that used for the input selector switch and consumer education requirements (Section 76.66).[92] NAB further suggests that this notice be made within 60 days of the effective date of these rules, upon initial installation of cable service for new subscribers and annually thereafter. NCTA states that operators should be required to provide notice at the time of installation in combination with the required offer to sell or lease converter boxes.[93] A few cable operators comment that cable operators should be permitted to include such notification in their monthly billing statements. They also assert that cable operators should not be required to keep decoders on hand for subscriber lease or purchase, if decoders are available from local electronics dealers.[94] TKR opposes any rigid procedures regarding a system's obligation to identify the signals carried in fulfillment of the must-carry provisions.[95] However, Fairfax County suggests that cable operators be required to respond to written requests, in writing, within 30 days.[96] For other requests, Fairfax proposes that the cable operator should be able to respond verbally or by directing the requesting party to the public file.[97] In addition, Trinity states that the identity of such signals and eligible stations not being carried should be provided, in writing, to new cable subscribers, and all subscribers every six months.[98]

34. We believe that the 1992 Act is clear in its requirement that all local commercial television stations carried in fulfillment of the must-carry requirements must be provided to every cable subscriber and must be viewable on all television sets that are connected to the cable system by a cable operator or for which the cable operator provides a connection. The Act does not give the Commission authority to exempt any class of subscribers from this requirement. Moreover, there is no reason to believe that viewers in hotels, hospitals or other such establishments are not interested in receiving local broadcast service. Thus, we will make no distinction between individual and commercial subscribers in implementing this statutory provision.[99]

35. Based on the suggestions of commenters, if a cable operator authorizes subscribers to install additional connections, but does not provide such connections, we will require the cable operators to notify subscribers no later than June 2, 1993, that they need converters or additional equipment for connections to receive the system's must-carry signals on each television receiver. The notice must explain the circumstances under which additional equipment is needed, whether the equipment is available from the cable operator or available from local stores and provide information regarding installation of such equipment. We will permit cable operators to include this notice in a monthly billing statement. We reject the suggestions for a longer time period because a longer lag between the effective date of our rules and such notice may result in cable subscribers being deprived of local broadcast signals that they are unable to receive without additional connections. We further find this approach consistent with the requirement that all must-carry signals be available to all subscribers. In addition, we will require cable operators to notify new subscribers upon initial installation and all affected subscribers once a year of the need for additional equipment to receive the must-carry signals.

36. Consistent with our decision regarding identification of NCE stations carried to fulfill the must-carry requirements, we also will require that, by June 17, 1993, a cable operator must place in its public file a list of the local commercial broadcast stations carried on its system pursuant to Section 614. For each must-carry signal, the list must identify the call sign, community of license, broadcast channel number and channel position on the cable system. In response to a written request regarding carriage of must-carry signals, a cable operator will be required to respond within 30 days, in writing.

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[90] Section 614(b)(7). *See Notice of Proposed Rule Making* in MM Docket No. 92-266, 8 FCC Rcd 510 (1992).

[91] Continental Comments at 15-16; *contra* NAB Reply at 10; Association of Independent Television Stations (INTV) Reply at 15.

[92] NAB Comments at 5. We note that the statute requires us to eliminate that requirement in this proceeding.

[93] NCTA Comments at 9.

[94] Tel-Com Comments at 10; Armstrong Comments at 9; Inter-Media Comments at 9; TKR Comments at 5.

[95] TKR Comments at 5.

[96] Fairfax County Reply at 5.

[97] Fairfax County Reply at 6. Other parties state that the cable operator should place a list identifying the must-carry stations in its public file. NATOA Comments at 10; Palm Desert Reply at 8-9.

[98] Trinity Comments at 9-11.

[99] Commercial subscribers, of course, may exclude the must-carry signals in cases where converters or other equipment are needed to receive such signals, the subscriber elects not to obtain such equipment, and the cable operator does not provide the connections for all television receivers in the commercial establishment. In this case, the operator will have fulfilled its obligations under the Act if it notifies the establishment about the availability, through lease or sale, of individual converter boxes.

2. Definition of a Television Market

37. *Use of ADI Markets for Determining Must-Carry Obligations.* The 1992 Act provides that a local commercial television station will be entitled to must-carry status on all cable systems located in the same Area of Dominant Influence (ADI), as defined by Arbitron, as the station.[100] Each county in the contiguous United States is assigned by Arbitron exclusively to one ADI, based on patterns of television viewing in the county.[101] The *Notice* requested comment regarding the appropriate procedures for accommodating the sporadic changes that occur in ADI assignments from year to year. It also asked for suggestions for determining the relevant market for stations located outside the continental U.S.

38. While a few commenters suggest that the current list of ADI county assignments be frozen,[102] a majority of commenters favor updating the list of ADI counties once every three years in a manner that coincides with the must-carry/retransmission consent election.[103] For areas outside the continental U.S., a number of commenters propose the use of other available sources equivalent to Arbitron, such as Nielsen Designated Market Areas (DMAs) for Alaska and Hawaii and Mediafax for Puerto Rico, which Mediafax considers one television market.[104] Commenters also suggest that Puerto Rico and the U.S. Virgin Islands should each be considered one ADI.[105] Alternatively, Acton argues that such stations should be required to subscribe to Arbitron so that it will establish ADIs for their areas.[106]

39. We will establish a scheme whereby ADI designations will be set for a three-year period designed to coincide with the three-year election time frame for the must-carry/retransmission consent election. We believe that this procedure will allow us to take into account changing markets while at the same time providing stability for the affected parties. As suggested by INTV, the current list of ADIs will be in effect for the initial election period.[107] For the next election period in 1996, we will use the list published in the Spring of 1995; for the election in 1999, the applicable list of ADIs will be the one published in the Spring of 1998, etc. Thus, each broadcast television station will be considered local in those counties listed in the same ADI to which it is assigned. We will make one exception, however: Each station also will be considered a must-carry station in its home county, even if that station is assigned to an ADI different from that of its home county.[108] For Alaska and Hawaii, we believe that Nielsen's DMAs, which are developed in a manner similar to the ADIs, should be used. Furthermore, as proposed by commenters, we will consider Puerto Rico, U.S. Virgin Islands and Guam each one ADI.

40. In the *Notice*, we sought comment on how to accommodate systems that serve communities located in more than one county where such counties are assigned to different ADIs by Arbitron. Cable commenters generally support the use of an operator-designated principal headend for determining the location of a cable system. They contend that a cable system should only be required to carry the television signals in one ADI and that to require otherwise would be unnecessarily burdensome.[109] Several cable operators propose that the location of the system's principal headend or the center of the system coordinates should be considered *prima facie* evidence of a reasonable choice.[110] A number of commenters state that a reasonable alternative for designating the location of the system would be the community with the bulk of subscribers.[111] Some cable operators state that it is reasonable to require them to declare their choice of principal headend within a specified period (*e.g.*, 15 days) after the rules are issued.[112] By contrast, broadcast commenters state that carriage rights should be determined for each community served by a system on an individual basis,[113] or should take into account the entire geographic area served by the operator even if this results in mandatory carriage of signals from multiple ADIs.[114] They claim that any other approach is inconsistent with Congress' intent to preserve local television service.[115]

41. We believe it is in the public interest and fully consistent with the 1992 Cable Act to require a cable operator to provide the subscribers in each community its serves with the broadcast television stations that are local to that community. Thus, in situations where a cable system serves a community or communities in more than one county and those counties are assigned to different ADIs, the cable operator must carry all of the local commercial television signals in both ADIs (subject to the statutory safeguards provided for in the Act, *e.g.*, the limitations on one-third of usable channel capacity, the substantial duplication limitation, the closest network affiliation limitation, etc.). If the cable operator is technically capable of segregating the channels provided to each community

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[100] Section 614(h)(1)(C) specifies that a broadcasting station's market shall be determined in the manner provided in Section 73.3555(d)(3)(i) of the rules, as in effect on May 1, 1991. Section 73.3555(d)(3)(i), now redesignated Section 73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. 47 C.F.R. § 73.3555(e)(3)(i).

[101] *See Notice* at 8059.

[102] Acton Comments at 7; TCI Comments at 7; Newhouse Comments at 31; Agape Church Comments at 1.

[103] *e.g.*, NAB Comments at 10-11; NCTA Comments at 13-14; INTV Comments at 4-5; TKR Comments at 6; Westinghouse Broadcasting Company (Westinghouse) Reply at 4.

[104] NAB Comments at 11; Malrite Communications Group (Malrite) Comments at 3; Burnham Broadcasting Company (Burnham) Reply at 3-4.

[105] Caribbean Communications Group (Caribbean) Comments at 3; Puerto Rico Cable TV Association (PRCTA) Comments at 7.

[106] Acton Comments at 7 n.7.

[107] INTV Comments at 4. The current reference for Arbitron's ADIs is its 1991-1992 *Television Market Guide* that was published in the Spring of 1992. This list of the counties included in each ADI is based on the viewing patterns reported in Arbitron's *1991 County Coverage Surveys*. These ADI assignments will be used for the initial determinations of must-carry status.

[108] We note the case of KNTV, San Jose, which is assigned to the Salinas-Monterey ADI, even though its home county, Santa Clara, is considered part of the San Francisco ADI. *See* Granite Broadcasting Corporation (Granite) Comments at 7-13.

[109] *e.g.*, NCTA Comments at 10-11; InterMedia Comments at 10; Time Warner Comments at 13; TCI Comments at 4-5; TKR Comments at 5-6.

[110] Time Warner Comments at 15; Newhouse Comments at 30.

[111] NCTA Comments at 14; Comcast Corporation (Comcast) Comments at 3-4; Viacom Comments at 66-67.

[112] Time Warner Comments at 15; Adelphia Comments at 8; Newhouse Comments at 30.

[113] *e.g.*, NAB Comments at 7; INTV Comments at 3.

[114] *e.g.*, Continental Comments at 6; Westinghouse Reply at 3.

[115] NAB Comments at 7-9; AFLAC Broadcast Partners (AFLAC) Comments at 3; Westinghouse Reply at 3-4.

served, it may select, for must-carry purposes, from among those qualified commercial stations that are in the ADI in which each particular community is located. Thus, where it is technically able to do so, the cable operator may offer different must-carry channel line-ups in different communities based on the locations of the particular communities in the respective ADIs. However, if the cable system is not able to alter its channel line-up on a community-by-community basis and the system straddles two ADIs, all broadcast stations in both ADIs will be considered "local" for must-carry purposes. The statutory language and the legislative history lead us to find that this interpretation is the one intended by Congress.[116] Moreover, cable interests provide no evidence in the record that demonstrates that they are unable to configure their systems to meet this requirement.[117] It appears that a cable operator's choice of a central technical facility is simply a matter of convenience and that it is technically possible to accommodate these requirements in most cases. In addition, we are concerned that permitting cable systems straddling ADIs to choose in which of the ADIs they will be "located" would potentially allow some systems to evade must-carry obligations or make it more difficultfor certain stations to achieve must-carry status.[118]

42. *Modification of ADI Markets.* Section 614(h)(1)(C) of the 1992 Act permits the Commission to add communities to or subtract communities from a station's television market to better reflect marketplace conditions following a written request. The Commission also may determine that particular communities are part of more than one television market. The procedures recognize that ADI markets may not always accurately reflect the area in which a particular television station should be entitled to cable carriage, and will help ensure that disruption to subscribers over the broadcast signals they receive is minimized. The statute specifies that, when considering requests to modify a television station's market, the Commission shall afford particular attention to the value of localism by taking into account such factors as 1) whether the station, or similarly situated stations, have been historically carried on the cable system or systems within such community; 2) whether the station provides coverage or other local service to the community; 3) whether any other station qualified for carriage provides coverage of news or programming of local interest; and 4) the local viewing patterns in both cable and noncable homes in the community. We asked parties to consider the procedural aspects of requests for modifications to ADI markets and whether more specific or additional criteria are needed to implement this provision.

43. Most commenters support our proposal to use the special relief process to modify television markets, pursuant to Section 76.7 of our rules.[119] They also believe it is appropriate to permit broadcasters and cable operators to make such requests,[120] although a few commenters assert that such filings should only be permitted from broadcasters[121] or only from cable operators.[122] Other commenters state that, in addition to broadcast stations and cable systems, program copyright owners[123] and subscribers[124] should be able to file or participate in these proceedings. Many cable operators recommend that cable systems be required to maintain the status quo while Commission action is pending on a request, but INTV would require carriage of a signal seeking to be added even before an FCC decision.[125] Several cable operators ask that the Commission permit conditional implementation of any requested market modification while it is pending in cases where the cable operator and the affected broadcaster are in agreement.[126]

44. The Commission received many recommendations regarding the factors that we are required to consider when evaluating requests to modify a station's market for must-carry purposes. For example, a number of parties suggest that the enumerated factors be prioritized, giving greatest weight to historic carriage,[127] viewing patterns,[128] in-state stations[129] or smaller market stations.[130] Several parties favor adding specific criteria to the factors, such as coverage contours,[131] mileage zones,[132] the significant viewing standard,[133] a standard for programming of community interest,[134] and inclusion of sports programming in consid-

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[116] House Report at 97.

[117] Indeed, in its comments, Continental indicates that it plans to consolidate many of the headends for its Western New England region and that using a principal headend approach would create a situation where many systems will end up with distant must-carry signals in place of local stations. Continental Comments at 6.

[118] For example, Cablevision has announced that it is dropping the broadcast stations licensed in the Hartford-New Haven ADI, which have been carried historically, from several of its systems. *See, e.g., Electronic Media,* March 8, 1993, back cover. In one case, the cable system serves communities in both Fairfield and New Haven Counties. Fairfield County is located in the New York ADI, while New Haven County is assigned to the Hartford-New Haven ADI. It appears that, if this cable operator could select one principal headend and provide must-carry signals from only one ADI, those cable subscribers in the communities located in New Haven County would be deprived of their "local" television stations.

[119] *e.g.,* INTV Comments at 10-11; NCTA Comments at 14; NAB Comments at 12-13; Tel-Com Comments at 13; Malrite Comments at 4; *contra* WTKK TV (WTKK) Comment at 2. This commenter states that a rule making would be needed in each case.

[120] *e.g.,* INTV Comments at 8; NCTA Comments at 14; NAB Comments at 12-13; Time Warner Comments at 16; Armstrong Comments at 13; Malrite Comments at 3.

[121] AFLAC Comments at 4; Capital Cities/ABC (Cap Cities) Comments at 6.

[122] TKR Comments at 7.

[123] National Basketball Association and National Hockey League (NBA/NHL) Comments at 4-5.

[124] CFA/MAP Comments at 13; Malrite at 5.

[125] *e.g.,* Adelphia Comments at 10; TCI Comments at 9; Acton Comments at 9; INTV Comments at 7.

[126] *e.g.,* Newhouse Comments at 33; Adelphia Comments at 10; *contra* INTV Reply at 18.

[127] INTV Comments at 9; NCTA at 15.

[128] Adelphia Comments at 10; Time Warner Comments at 16-17.

[129] Continental Comments at 8; Time Warner at 17

[130] United Communications Corporation (United) Comments at 3.

[131] Adelphia Comments at 10; IFE Comments at 6; Mid-State Television (Mid-State) Comments at 4-5.

[132] TKR Comments at 7; WTKK Comments at 2-3; Mid-State Comments 4-5.

[133] Adelphia Comments at 10; TKR Comments at 7; Comcast Comments at 4.

[134] Malrite Comments at 5.

ering local service.[135] A few commenters propose other factors, including an examination of the retail trading area served by a station[136] and a determination of whether a station's nonbroadcast activities show a commitment to local service.[137]

45. We conclude that requests for modification of a station's ADI market should be made in accordance with the procedures specified in Section 76.7 of our rules, as modified herein, for special relief filings.[138] We find this process more expeditious and less burdensome on parties and the Commission than the rulemaking process, while providing sufficient opportunity for full participation by affected parties. By using the special relief process, the procedural aspects of filing for modifications to ADI markets will be consistent with Section 614(h)(1)(C)(iv), which mandates that the Commission provide for expedited consideration of such requests.

46. We will allow either broadcasters or cable operators to file market modification requests since both parties have legitimate interests in such matters. A broadcast station submitting such a request will be required to serve a copy of its request on the cable system, other non-superstation broadcasters whose signals are carried on that system and any franchising authorities that regulate the system. Cable systems that file requests to modify a station's market must serve the request on the affected broadcaster, all non-superstation broadcast stations carried on the system and the franchising authorities in the communities served by the system. During the pendency of a petition before the Commission, cable operators will be required to maintain the status quo with regard to signal carriage. Not only is this the least disruptive approach, but it also is consistent with Section 614(h)(1)(C)(iii), which prohibits cable operators from dropping any commercial station pending disposition of requests filed pursuant to this section. We reject INTV's proposal to require a signal to be added while a petition is pending, since an adverse Commission decision would result in the unnecessary and potentially harmful disruption of a recently added signal quickly losing carriage. As requested by commenters, we will permit conditional implementation of cable operator/broadcaster agreements to modify a given television market only where other stations' carriage and channel positioning rights are not affected by the agreement.

47. This section of the statute is intended to permit the modification of a station's market to reflect its individual situation.[139] Therefore, we do not want to restrict the types of evidence that parties can submit to demonstrate the propriety of changing a station's must-carry market. We also do not believe that it is advisable to prejudge the importance of any of the factors specified in the statute since each case will be unique. As guidance to petitioners, however, we likely would find the following information to be helpful. For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable and noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable *and* noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

48. *Section 76.51 Top 100 Market List.* Section 614(f) requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the existing rules.[140] This list was derived largely from Arbitron's 1970 prime time household rankings. As we observed in the *Notice*, this list is different from the current Arbitron list of markets due to the many new stations that have commenced operation and the population shifts that have occurred since the list was incorporated in our rules. We further noted that since Congress specifically directed the Commission to use current ADI markets for determining must-carry rights, it appears that updating the Section 76.51 list would primarily affect copyright liability under the compulsory license, although it would also have some impact on the application of our territorial exclusivity, syndicated exclusivity and network nonduplication rules.[141]

49. We had hoped that in response to the *Notice* commenters would provide us with a mechanism for revising the top 100 market list, including criteria for determining when a city of license should become a designated community in a television market. However, the comments we received were more generalized. A number of parties suggest that the list be expanded to include all markets, not just the top 100 markets.[142] Because market rankings affect copyright liability and the application of the Commission's exclusivity rules,[143] a few cable interests recommend that

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[135] NBA/NHL Comments at 6.

[136] Mid-State Comments at 2-5.

[137] Trinity Comments at 8-9.

[138] We note that we are changing the filing deadlines for all special relief petitions and must-carry complaints. *See* para. 118 *infra*.

[139] A few parties contend that ADI modification should be on a market, rather than a station, basis. While the 1992 Act specifically refers to adding or subtracting communities from the market of "a particular television broadcast station," we will not preclude joint filings by a group of stations or a single request from a cable operator for changes for more than one station licensed to the same community, as long as the submitted information demonstrates that each station is entitled to have its market modified.

[140] 47 C.F.R. § 76.51.

[141] *See* 47 C.F.R. §§ 73.658(m) (territorial exclusivity); 76.92-97 (network nonduplication); 76.151-163 (syndicated exclusivity).

[142] Fox Comments at 7; INTV Comments at 11; NAB Comments at 18; Great America Comments at 8.

[143] For copyright purposes, the fees charged for distant signal carriage under the compulsory license are based on the rank of the market where the cable system is located. Under the Commission's network nonduplication rules, the zone within which a station is entitled to enforce exclusivity rights is also determined by market rank.

we not rerank the list of television markets, but simply revise the market names to reflect new cities of license.[144] Several broadcasters state that each market name should include every ADI city of license in the market designation.[145] Another proposed alternative is to simply replace this market list with Arbitron's ADI list.[146] On the other hand, NAB states that the Commission should not just adopt Arbitron market designations, but should make adjustments to Arbitron's list based on distances between communities, coverage patterns and competitive and public interest considerations, as was done when the original list was established.[147] Many commenters assert that the list should be updated every three years, with sufficient lead time as is done for the prime time access rule (PTAR), and effective consistent with the must-carry/retransmission consent election requirement and the copyright liability accounting periods.[148]

50. We do not believe that a major update of the Section 76.51 market list is necessary on the basis of the record before us. Wholesale changes in or reranking the markets on the list would have significant implications for copyright liability and for the Commission's broadcast and cable program exclusivity rules. We are not prepared to make such changes on the present record. Therefore, at this time, we will only update the existing list by adding those designated communities requested by parties providing specific evidence that change to a particular market is warranted. In particular, we will make the following specific modifications: (1) rename the Columbus, Ohio, market to include Chillicothe; (2) add New London to the Hartford-New Haven-New Britain-Waterbury, Connecticut, market; and (3) change the Atlanta, Georgia, market to Atlanta-Rome.[149] We will consider further revisions to this list on a case-by-case basis. Where appropriate, we will consider such cases under an expedited rulemaking procedure whereby we will issue a notice of proposed rulemaking based on the submitted petition without first seeking public comment on whether we should do so. We will expect to receive evidence that demonstrates commonality between the proposed community to be added to a market designation and the market as a whole in such petitions.[150] We will also consider requests to remove named communities from specific hyphenated markets using the same procedure.

51. *Conflicting Market Designations.* The *Notice* asked commenters to consider the potential effects of any modifications to current market designations on other existing rules and the potential conflicts that could occur because these market designations cover different geographic areas. In particular, we observed that the situation may arise where a station is entitled to must-carry status on the basis of its ADI at the same time that another station can request deletion of some portion of its programming because the applicable exclusivity and nonduplication rules use the Section 76.51 market list. Moreover, the syndicated exclusivity and network nonduplication rules use mileage zones for determining areas of protection based on a market's rank pursuant to the Section 76.51 top 100 market list. For compulsory copyright liability, the Section 76.51 market list is used to distinguish between local and distant signals and, based on a market's rank, the fees that are charged for distant signal carriage under the compulsory license. Thus, a station might be entitled to must-carry status but still be considered a distant signal for copyright purposes.

52. With respect to our program exclusivity rules, several commenters contend that we should not modify those rules, since the extent of conflict is not known and problems can be handled through special relief at least for the short term.[151] A few broadcast interests suggest that the applicable zones for application of the exclusivity rules be changed to the ADI to match the must-carry rules.[152] Alternatively, INTV recommends that every station be considered significantly viewed throughout its ADI. Under this approach, all stations within an ADI would be protected from deletion under our exclusivity rules.[153] Numerous commenters propose that we follow the provisions in the Act that prohibit an NCE must-carry station from receiving protection against another NCE station carried in

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[144] Adelphia Comments at 11-12; Time Warner Comments 18-19.

[145] Great America Broadcasting Company *et al.* (Great America) Comments at 8; R&R Media Corporation (R&R) Comments at 2-3; Fox Comments at 7.

[146] Cap Cities Comments at 9.

[147] NAB Comments at 18.

[148] *e.g.*, NAB Comments at 18; Armstrong Comments at 15; INTV Comments at 11; Cap Cities Comments at 10. Alternatively, annual updates are proposed by Malrite. Malrite Comments at 8.

[149] *See* Comments of Triplett & Associates (Triplett), R&R and TV 14 Reply. *See also Notice of Proposed Rule Making* in MM Docket No. 92-295, 7 FCC Rcd 8591 (1992) (request by TV 14 to include Rome, Georgia, in the Atlanta television market). In that regard, interested parties commenting in MM Docket No. 92-295 were The Georgia Television Company ("GTC"), licensee of WSB-TV, Atlanta, and WGNX Inc. ("WGNX"), licensee of WGNX(TV), Atlanta, who both urge that TV 14's request be deferred or dismissed pending the outcome of this proceeding; Scripps Howard Cable of Northwest Georgia, operator of the cable system serving Rome and surrounding areas, which supports TV 14's proposal; and the Georgia Public Television Commission ("GPTC"), licensee of noncommercial educational station WGTV(TV), Athens, Georgia, which supports TV 14's request, but also proposes that the present Atlanta market should be redesignated to include Athens. In light of our action today in this proceeding, GTC's and WGNX's comments are moot. Further, because the *Notice of Proposed Rulemaking* in MM Docket No. 92-295 sought comment on the proposal to add Rome to the Atlanta market, we will not consider GPTC's proposal regarding Athens. Of course, GPTC is free to refile its proposal, and the Commission will then evaluate the efficacy of proceeding independently thereon. In light of our action herein, we will terminate the proceeding in MM Docket No. 92-295.

[150] In order to expedite this process, the Chief, Mass Media Bureau, is authorized to act on such petitions under delegated authority. We expect that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals. Interested parties will then have a full opportunity to participate in the proceeding and to react to the proposal. The Commission will have an opportunity to review all such decisions upon request for review by any party. Similarly, the Bureau Chief is authorized to act on requests for the inclusion or elimination of specific communities from the local markets of stations in accordance with the factors set forth in Section 614(h)(1)(C) of the Act and the related implementing rules adopted herein discussed above.

[151] Fox Comments at 8; NAB Comments at 20; Malrite Comments at 8; Motion Picture Association of America (MPAA) Reply at 18-19.

[152] Cap Cities Comments at 10; Cedar Rapids Television Company (Cedar Rapids) Comments at 3-4.

[153] INTV Comments at 12.

fulfillment of must-carry obligations.[154] Other proposals include grandfathering existing exclusivity contracts[155] and simply eliminating the syndicated exclusivity and network nonduplication rules.[156]

53. In the *Notice*, we observed that the United States Copyright Office (Copyright Office) has traditionally followed any changes we have made to the Section 76.51 list.[157] In its comments in this proceeding, the Copyright Office states that it will determine whether to use an updated Section 76.51 list after this proceeding is completed. It further explains that it has incorporated our market modifications in the past because the affected parties were in agreement and the changes did not represent any modification of the original must-carry rules that it uses to differentiate between local and distant stations. In addition, the Copyright Office states that, at the time of its actions, it did not foresee a large number of market redesignations.[158] Some commenters suggest that we should not address copyright matters in this proceeding or, in light of the Copyright Office's comments, that we should ensure that any changes we make do not affect copyright liability.[159] Furthermore, a number of commenters suggest grandfathering existing copyright status, especially if changes would result in fewer lower fee signals.[160]

54. We believe that we have alleviated many of the concerns expressed by the commenters by making only minor, well-documented revisions to the existing top 100 market list. Since market rankings will remain the same, the zones of exclusivity protection will be unchanged for each market, except in those few cases where additional designated communities are now named. While we recognize that under the existing syndicated exclusivity and network nonduplication rules there may be instances where a station entitled to must-carry status is subject to blacking out, we do not believe it is appropriate to modify the rules in this proceeding.[161] This decision appears consistent with the statute and the legislative history. We note that unlike the comparable situations for NCE stations, the statute does not prevent one commercial must-carry signal from requesting network nonduplication protection against another such signal.[162] The provision concerning the carriage of commercial must-carry signals in their entirety specifically exempts situations where "carriage of specific programming is prohibited" under Section 76.67 or Subpart F of Part 76 of our rules.[163] Thus, we conclude that the existing syndicated exclusivity and network nonduplication rules should remain unchanged with respect to commercial stations. With respect to copyright matters, we believe that Congress intended for our updated Section 76.51 list to be applied to assess copyright liability, since ADIs are now to be used for market designations for must-carry purposes.

3. Selection of Signals

55. In situations where the number of qualified stations exceeds the number of signals a cable system is required to carry, Section 614(b)(2) gives the cable operator discretion in selecting the local commercial television stations that shall be carried to fulfill its must-carry requirements, except that a cable operator is not permitted to carry a qualified low power station in lieu of a local commercial television station. In addition, this subsection provides that if the cable operator elects to carry an affiliate of a broadcast network, the cable operator shall carry the affiliate of such broadcast network whose city of license reference point is closest to the principal headend of the cable system.[164] Section 614(b)(5), in turn, states that a cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network. However, if a cable operator chooses to carry such duplicative signals, they may be counted towards fulfillment of the system's must-carry obligations.

56. The 1992 Act requires the Commission to define the term "network"[165] for purposes of applying the must-carry provisions in situations where the programming schedules of two or more stations are similar. In the *Notice*, we observed that Section 614(b)(2) and one part of Section 614(b)(5) address duplicating network affiliates and the second part of Section 614(b)(5) addresses any duplicating local commercial signal. We thus proposed to fashion a definition of network that incorporates the substantial duplication concept. Such a definition would be programming source-neutral and would be used for purposes of both Sections 614(b)(2) and 614(b)(5). Several cable operators favor using the same definition for the two terms and state that it would be easy to implement.[166] In addition, Cap Cities supports a source-neutral approach for application of Section 614(b)(5) and states that since the intent is to preserve cable operators' discretion and the public's viewing choice, the source of programming is irrelevant when assessing programming duplication.[167] These commenters generally recommend that the relevant term be defined as "airing the same programming (simultaneous or

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[154] NCTA Comments at 17; Time Warner Comments at 20; Appalachian Broadcasting Corp. (Appalachian) Comments at 10; Adelphia Comments at 20; Pulitzer Reply at 5.

[155] Great America Comments at 10-11.

[156] Acton Comments at 26-27; TCI Comments at 26-27.

[157] *Notice* at 8059-8060 n.24.

[158] Copyright Office Comments at 2-6.

[159] Time Warner Comments at 19; MPAA Reply at 17-18; Viacom Reply at 22.

[160] *e.g.*, Armstrong Comments at 14; United Video Comments at 5; Comcast Comments at 11-12; INTV Reply at 15.

[161] We note in particular that a more general evaluation of the network nonduplication, syndicated exclusivity and broadcast station territorial exclusivity rules is the subject of the pending Docket 87-24, *Further Notice of Proposed Rule Making* in Gen. Docket 87-24, 3 FCC Rcd 6171 (1988). The exclusivity rights of stations choosing retransmission consent are discussed below.

[162] Section 615(f).

[163] Section 614(b)(3)(B). Section 76.67 requires the blacking out of certain sports broadcasts and Subpart F is our rules relating to nonduplication protection and syndicated exclusivity.

[164] The 1992 Act states that the closest station is determined by comparing the location of the principal headend of the cable system to the city of license as defined in Section 76.53 of our rules, 47 C.F.R. § 76.53, as of January 1, 1991, or any successor regulation. *See* paras. 9-10 *supra*.

[165] This requirement is set forth in Section 614(b)(2)(B) and noted in Section 614(b)(5).

[166] Armstrong Comments at 17-18; InterMedia Comments at 17-18; Tel-Com Comments at 18.

[167] Cap Cities Comments at 15-16.

not) during weekly prime time hours."[168] However, a few cable parties oppose our proposal and contend that Congress used two different terms that accordingly should be defined separately.[169]

57. Most of the comments on this issue proposed definitions of the terms "network" and "substantial duplication." For example, TKR suggests that network affiliates should be limited to ABC, CBS and NBC stations.[170] NCTA proposes that we adopt the network definition used for the financial interest and syndication rules (*i.e.*, an entity that provides on a regular basis more than 15 hours of prime time programming per week to interconnected affiliates that reach 75 percent of all television households).[171] Time Warner and Adelphia state that a network should be an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states. [172] CFA/MAP proposes a definition of network of 50 percent simultaneous weekly prime time programming.[173]

58. With respect to the definition of "substantially duplicated" programming, NAB states that the legislative history provides a clear guide that Congress intended to refer to stations broadcasting the same program at the same time over the majority of their entire program schedules.[174] However, a number of parties point out that the 1992 Act does not reflect this legislative history.[175] Some commenters propose a definition based on all-day viewing, including INTV, which would compare programming schedules between 6 a.m. and midnight and use a 50 percent cut-off.[176] Several parties propose that the test should be duplication, simultaneous or not, of either 50 percent or more of a station's total weekly programming or 50 percent or more of its prime time programming.[177] Acton and TCI state that a dual standard is appropriate because a focus on only all-day might overemphasize diversity in time periods when viewership is low and prime time alone would be inappropriate since it represents only a small percentage of the broadcast day.[178] Alternatively, Continental proposes a standard based on a 50 percent benchmark during prime time, the period when viewers and advertising revenues are most heavily concentrated. NBC, which also favors this proposal, notes that it comes from the post-*Quincy* must-carry rules and that Congress has not indicated any dissatisfaction with this definition.[179]

59. Upon evaluation of the comments, we believe that it is appropriate to treat the provisions of Sections 614(b)(2) and Section 614(b)(5) separately. We note that the two provisions are intended to accommodate different situations and are addressed separately in the statute and its legislative history. Specifically, Section 614(b)(2) applies when more local commercial stations request carriage than the cable system is required to carry. In this situation, Congress sought to ensure that subscribers receive the network affiliate closest to the system and "most likely to be responsive to their local needs and interests."[180] By contrast, Section 614(b)(5) addresses an alternate scenario in which the operator has sufficient channel capacity to carry all signals requesting carriage, but the programming on one or more signals substantially duplicates that of another signal. In this case, Congress intended to "preserve the cable operator's discretion while ensuring access by the public to diverse local signals" by permitting the system to carry only one of the substantially duplicating signals.[181] The commenters have persuaded us that, in view of these different purposes of Sections 614(b)(2) and (b)(5), we should not employ a single definition for network and substantially duplicative programming. We also note that the statute and legislative history direct the Commission to define two separate terms -- a broadcast "network" and "substantial duplication."[182]

60. We conclude that, for purposes of both subsections (b)(2) and (b)(5), network affiliates should include only stations affiliated with those entities that are considered traditional national networks. We believe that this approach reflects both congressional intent, as reflected by Section 614(b)(5)'s reference to a "station affiliated with a particular broadcast network (as such term is defined by regulation)," and the difference between stations that simply duplicate programming and those that have a continuing arrangement with a network that includes more than just the distribution of programming. At the same time, we seek a definition that not only includes entities that traditionally have been considered national television networks, but is also flexible enough to accommodate the changing video marketplace. Accordingly, we will use the definition of a network applicable to the filing of affiliation agreements as set forth in Section 73.3613(a)(i) of our rules. When a network meets the criteria specified in this definition, Commission recognition of the arrangement is triggered and the formal filing of relevant documents is required. Thus, we will define a "network" as "an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states."[183] To define "substantial duplication" for the ap-

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[168] This definition is similar to the definition of "network" included in the 1986 post-*Quincy* must-carry rules adopted in response to the decision in *Quincy Cable TV, Inc. v. FCC (Quincy)*, 768 F. 2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). *See also Report and Order* in MM Docket No. 85-349, 1 FCC Rcd 864 (1986). Commenters differ on whether to call the term network or substantial duplication and whether prime time is 6-11 p.m. or 7-11 p.m. Cap Cities Comments at 16; Armstrong Comments at 17; InterMedia Comments at 17; Tel-Com Comments at 18; InterMedia Reply at 6; Time Warner Reply at 10.

[169] Adelphia Comments at 14; Time Warner Comments at 20-21; NCTA Comments at 18.

[170] TKR Comments at 9.

[171] *See* 47 C.F.R. § 73.662(h)(i). NCTA Comments at 19; *contra* INTV Reply at 11.

[172] This definition of network is from the rules concerning the filing of affiliation contracts. *See* 47 C.F.R. ? 73.3613 (a) (i). Adelphia Comments at 14; Time Warner Comments at 20-21; *contra* INTV Comments at 11.

[173] CFA/MAP Comments at 13.

[174] NAB Comments at 20-21 referring to the House Report at 94.

[175] Viacom Reply at 19; INTV Reply at 10.

[176] INTV Comments at 13-14.

[177] TKR Comments at 8; Acton Comments at 14-15; TCI Comments at 14-15; Viacom Comments at 65-66. Viacom further suggests that the comparisons be made during the immediately preceding sweeps period.

[178] TCI Comments at 14-15; Acton Comments at 14-15.

[179] Continental Comments at 14; National Broadcasting Company (NBC) Comments at 18-19.

[180] House Report at 92.

[181] House Report at 94.

[182] House Report at 92, 94.

[183] We will define "regular basis" to mean exceeding the

plication of Section 614(b)(5), we use the guidance provided in the legislative history that indicates that this term is intended to refer to the "simultaneous transmission of identical programming on two stations" and which "constitutes a majority of the programming on each station."[184] Accordingly, two stations will be considered to substantially duplicate each other "if they simultaneously broadcast identical programming for more than 50 percent of the broadcast week."[185] Moreover, for purposes of this definition, identical programming means the identical episode of the same program series.[186]

61. In a related matter, NCTA seeks a clarification that the requirement to carry the closest network affiliate only applies when an operator exceeds its cap on the number of must-carry stations and does not apply when the cable system is choosing between duplicating stations pursuant to Section 614(b)(5). NAB responds that NCTA's interpretation is too narrow, is at odds with the legislative history and ignores the fact that the closest affiliate competes with the cable system for advertising.[187] While not explicitly stated, we believe that NAB's interpretation more closely parallels congressional intent in this regard. The must-carry provisions of the 1992 Act are intended to provide local television stations priority with respect to cable carriage on local cable systems. Thus, consistent with this approach, we will require that the closest station be carried when a cable operator declines to carry multiple network affiliates or duplicating stations. In addition, Southwest Missouri asks whether the carriage of a non-ADI network affiliate that is closer than an ADI affiliate would permit the operator not to carry the distant ADI affiliate because its carriage is duplicative.[188] The 1992 Act gives cable operators discretion to select which of duplicating must-carry signals to carry. In the situation posed by Southwest Missouri, the closer station would not meet the statutory definition of "local commercial television station" and the comparison would not be relevant.

4. Low Power Television Stations

62. *Definition of Low Power Television Stations.* Pursuant to Section 614(a) of the 1992 Act, a cable system's signal carriage obligation includes carriage of "qualified" low power television (LPTV) stations in certain limited circumstances. An LPTV station, as defined in Section 614(h)(2), qualifies for must-carry rights if the station conforms to the Commission's LPTV rules,[189] broadcasts for at least the minimum number of hours required of commercial broadcast stations by the Commission[190] and adheres to certain Commission requirements regarding non-entertainment programming and employment.[191] However, an LPTV station will not be qualified unless the Commission determines that the provision of programming by such station would address local news and informational needs not being adequately served by full power television stations, because such full power stations are distant from the LPTV station's community of license. In addition, the LPTV station must comply with the Commission's interference regulations for LPTV stations;[192] it must be within 35 miles of the cable system's principal headend and deliver to the headend a good quality over-the-air signal; its community of license and the franchise area of the cable system must both have been located outside of the largest 160 Metropolitan Statistical Areas (MSAs) on June 30, 1990, and the population of the LPTV station's community of license on that date must not have exceeded 35,000; and there cannot be any full power television station licensed to any community within the county or other political subdivision (of a State) served by the cable system. Only if all of these requirements are met will an LPTV station be entitled to must-carry status. In the *Notice*, we sought comment on the implementation of this definition and the requirements of the 1992 Act relating to carriage of LPTV stations.[193]

63. The *Notice* first inquired whether a case-by-case determination of an LPTV station's qualification for must-carry status would be required for each LPTV station asserting must-carry rights or whether a general rule could be relied upon.[194] Several commenters responded that the statutory language suggests that the Commission must make an individual determination regarding qualification of each

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specified number of hours per week on an average basis during the preceding six months of operation. The requirement that stations involved in such arrangements must be located in 10 or more states should be sufficient to exempt regional networks from consideration in this context, as we believe Congress intended.

184 House Report at 94.

185 We conclude that it is appropriate to use a different definition for substantially duplicated signals in the commercial station context than in the NCE situation. Commercial networks distribute their programming for simultaneous broadcast, at least throughout a given time zone, while noncommercial network programming is often broadcast at a time chosen by the station.

186 We also will consider programming to be duplicative in cases where the stations involved are located in contiguous time zones and the hour of broadcast differs by one hour.

187 NAB Reply at 22-23 citing the Senate Report at 84-85. *See also* Granite Comments at 22-23.

188 Southwest Missouri Cable TV (Southwest Missouri) Comments at 6-7.

189 *See* 47 C.F.R. §§ 74.701-74.784.

190 *See* 47 C.F.R. § 73.1740.

191 Section 614(h)(2)(B) provides that "such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;" *See also* 47 C.F.R. Part 73.

192 *See* 47 C.F.R. § 74.703.

193 *Notice* at 8061.

194 *Notice* at 8061. In footnote 39 of the *Notice*, we also asked if changes should be made to the low power television rules, Part 74, to indicate the distinction between the two classes of LPTV stations. Community Broadcasters Association (CBA) responded that the distinction should not be based on must-carry status, but rather on the LPTV's adherence to Part 73 of our rules. CBA Comments at 12. We believe it unnecessary to create a new Part 74 section of the rules relating to qualified LPTV stations, and instead will rely on the must-carry rules implemented herein to govern those LPTV stations which will qualify under the Act.

LPTV station asserting must-carry rights. Acton and TCI state that the language of the Act indicates that the initial burden is on the LPTV station asserting must-carry rights to prove to the Commission that it is qualified, after which the Commission should issue an "eligibility certification" which would be presented by the LPTV station to the cable operator.[195] Other commenters suggest that at a minimum the Commission must make some final determination as to an LPTV station's qualification and that the cable operator should not be obligated to carry the LPTV station until the Commission has determined that the station is qualified.[196] CBA argues that case-by-case determinations would frustrate Congressional intent to grant certain LPTV stations must-carry rights, and would be administratively inefficient.[197]

64. The *Notice* also sought comment on how we should identify LPTV stations that address local news and informational needs that are not being adequately served by full power stations in the area. We tentatively concluded that the 1992 Act requires the Commission to make a determination regarding fulfillment of community needs only if an LPTV station asserts must-carry rights against a cable operator and is refused carriage.[198] Cable interests request that specific criteria be established by which a cable operator can make a good faith assessment of an LPTV station's eligibility under the statute, specifically with respect to the meeting of community needs.[199] The LPTV interests generally agree with the Commission's tentative interpretation that a determination regarding fulfillment of community needs should be made only if an LPTV station is refused carriage.[200] However, when an LPTV station is denied carriage and requests Commission review, CBA recommends that the Commission avoid making overly specific rules relating to community needs, as those needs may vary greatly.[201] Hence, CBA asserts that the definition provided in Section 614(h)(2)(b) should be adopted without any further specificity.[202] Alternatively, Moran states that, consistent with the Commission's current renewal policies for broadcast television licenses, the determination could be based on a review of each LPTV station's issues and program lists supplemented by declarations from area residents and community leaders.[203]

65. We believe that the public interest and congressional intent require that, once must-carry rules and procedures for LPTV stations have been established, the Commission should intervene as little as possible in this area. A preliminary case-by-case determination by the Commission of each LPTV station's qualification for must-carry status would be an unnecessary burden and create delays in the implementation of must-carry rules. Once an LPTV station has made a showing of its/ must-carry eligibility to the cable operator, we will initially rely on the cable operator to review the requests and, where appropriate, voluntarily carry the qualified LPTV station without Commission intervention. This would appear to be the intent of the preliminary complaint steps outlined in Section 614(d)(1). The definition of a qualified LPTV station is rigorous enough, without the additional burden of presenting evidence of eligibility to the Commission prior to the assertion of must-carry rights. However, we do believe that an LPTV station which asserts must-carry rights must be prepared to demonstrate its compliance with the statute, and the extent and manner in which it is meeting community needs.

66. In general, an LPTV station asserting must-carry rights should provide the cable operator with the same evidence regarding its must-carry qualifications (including its role in addressing community needs) that the station would present to the Commission should its request for carriage be denied.[204] The cable operator will then be obligated to give full consideration to the request, and to respond to the LPTV station within the time frames specified herein.[205] In the event an LPTV station asserting must-carry rights is denied carriage, the station must follow the procedures detailed herein with respect to remedies for denial of carriage.[206]

67. *Signal Carriage Obligations.* Cable systems are required to carry a qualified LPTV station only if there are not sufficient full power local commercial television stations to fulfill the cable operator's must-carry obligations under Section 614(b).[207] Assuming this requirement is met, Section 614(c)(1)(A) requires a cable system to carry one qualified LPTV station if it has 35 or fewer usable activated channels,[208] and Section 614(c)(1)(B) requires that a cable system carry two qualified LPTV stations if the system has a capacity of more than 35 usable activated channels.[209] In

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[195] Acton Comments at 17, TCI Comments at 17. Both of these parties suggest that the must-carry obligation not be effective until 90 days after the certification is granted.

[196] Armstrong Comments at 18; InterMedia Comments at 18 and Reply Comments at 7; Tel-Com Comments at 20; Adelphia Comments at 15.

[197] CBA Comments at 2 and Reply Comments at 2. In reply, CBA asserts that the cable interests, in demanding individual determination of qualification, are attempting to create a situation in which a cable operator can delay the effectiveness of its must-carry obligation through the use of protracted proceedings before the Commission.

[198] *Notice* at 8061.

[199] Comcast Comments at 10.

[200] *Notice* at 8062.

[201] CBA Comments at 4. NACB asserts that the definition of "qualified" is already too narrow and that the reliance on local news and information unjustly excludes educational institutions from qualifying. NACB Comments at 5.

[202] CBA Comments at 4.

[203] Moran Comments at 8-9. Moran cites *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 6363 (1989).

[204] *See* paragraph 119, *infra*.

[205] Comcast seeks assurances that the cable operator will not be subject to penalties for a good faith dispute over the eligibility of a LPTV station if the Commission subsequently determines that the LPTV station is qualified after the cable operator refused carriage. Comcast Comments at 10. We do not anticipate that a good faith disagreement over the eligibility of any LPTV station for carriage will result in any sanctions being levied against the operator. It does not appear that sanctions are allowed pursuant to Section 614(d)(3) unless, of course, the operator disobeys an order issued by the FCC.

[206] *See* Remedies at paragraph 115 *infra*.

[207] *See* §§ 614(c)(1)(A) and (B). We note that in paragraph 29 of the *Notice* we inadvertently left out the word "commercial" in describing this requirement, *Notice* at 8061.

[208] *See* definition of activated channels at paragraph 13 *supra*.

[209] When the number of local commercial television stations exceeds the maximum number of such signals a cable system is

the *Notice*, we asked parties to address the criteria we should use to determine if a full power station is "local" for the purposes of this provision.[210] We then asked specifically if the market definition of Section 614(h)(1) should be applied, or if the limit should be based on county, state or mileage boundaries. In response to these questions, Comcast states that local full power television stations should include both commercial and noncommercial television stations.[211] CBA asserts that using the market definition of Section 614(h)(1) would defeat the purpose of the LPTV must-carry rules; since every county is assigned to an ADI and every ADI has a television station, every county will have a "local" ADI station that will make it more difficult for an LPTV station to secure carriage. CBA thus states that a full power station should be considered local only if it is within the same state as the cable system on which the LPTV station seeks carriage and it is within 35 miles of the cable system's headend.[212] On the other hand, Moran argues that the definition of local full power station should be consistent with local commercial television station as defined in Section 614(h)(1), thereby excluding from the definition those full power stations which simply rebroadcast the programming of another distant station.[213]

68. The *Notice* also asked for comments on procedures to be followed if a full power station came on the air preempting the LPTV station's must-carry rights. We proposed to require the cable operator to give notice to the LPTV station at least 30 days before discontinuing carriage of the LPTV signal and we requested comment on the need to notify subscribers of the upcoming change.[214] CBA requests that the cable operator give the LPTV station 120 days prior notice to permit that station to negotiate for carriage.[215] Several commenters urge adoption of a uniform notice provision and state that subscribers should be notified of any changes in carriage at least 30 days in advance, either with the billing or as a separate notice.[216]

69. With respect to the requirements of Section 614(c)(1), we interpret the "lack of enough full power local commercial television stations" as meaning those stations as defined in Section 614(h)(1) of the Act. Indeed, we believe that the Act's specific definition of a local commercial television station leaves no room for a different interpretation.[217] We note that the statute provides the opportunity for cable operators and broadcasters to request amendment of an ADI market pursuant to Section 614(h)(1)(C) and we have established procedures for such requests pursuant to Section 76.7 of our rules. In the event a new local full power station enters the market, requiring displacement of the LPTV station under Section 614(b)(2)(A), the cable operator will be required to give both the LPTV station and its subscribers 30 days notice prior to any change in carriage.[218]

70. *Use of PEG Channels.* A cable operator required to carry more than one signal of a qualified LPTV station may place the additional station on public, educational or governmental (PEG) channels not in use for their designated purposes, subject to approval by the franchising authority.[219] The *Notice* requested comments on the implementation of this provision, as well as the consequences of the franchising authority's withdrawal of approval for the LPTV station's use if a qualified PEG user later materializes.[220]

71. Public interest groups assert that the involvement of the franchising authority in approving and denying the use of PEG channels is "pivotal," since the franchising authority is charged with protecting its community's public interest. Palm Desert asserts that Section 611 controls the

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required to carry, the cable operator is prohibited from carrying a qualified LPTV station in lieu of a local commercial television station asserting must-carry rights. *See* Section 614(b)(2)(A).

[210] *Notice* at 8061.

[211] Comcast Comments at 9-10. In the context of this question, Comcast raises a concern regarding the statutory language of Section 614(h)(2)(F), which states in part that a low power station will be qualified "only if ... there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system." Comcast complains that this language is ambiguous and therefore subject to misinterpretation. Comcast asserts that potential confusion may arise from the syntax of the sentence which refers to a single county, even though many cable systems serve more than one county from a common headend. Comcast asserts that this should be interpreted to mean that where a cable system serves any community to which one or more full power stations are licensed, an LPTV station will not qualify for carriage on the system. Similarly, Section 614(h)(2)(E) refers to a single franchise area, but according to Comcast it should be interpreted to refer to all franchise areas served by a single system. We believe, contrary to Comcast's assertion, the correct interpretation is that, if a full power station is located in the same county or political subdivision (of a State) as an otherwise "qualified" LPTV station, the LPTV station will not be eligible for must-carry status.

[212] CBA Comments at 3.

[213] Moran Communications (Moran) Comments at 3-4.

[214] CBA Comments at 8. The LPTV interests assert that the introduction of a full power station does not require displacement of an existing LPTV station, stating that Section 614 of the 1992 Act only refers to what is required to qualify a LPTV station for must-carry rights, and that the Act does not address disqualifying that same qualified LPTV station. Referring to the *Cable System Carriage of TV Signals*, 41 RR 2d 121 (1977) at 127, CBA recommends the reinstatement of the "two way grandfathering clause," established by that Order, which would have the effect of requiring continued carriage of an LPTV station even if a new full power station enters the community. We do not believe the 1992 Act preserves the rights of an LPTV station if it loses its status due to the introduction of a new full power local station asserting must-carry rights.

[215] CBA also requests that the Commission recognize an affected LPTV station as a full party in interest in any proceeding to expand the broadcast market of the cable system as permitted by Section 614(h)(1)(c). CBA Comments at 8.

[216] CBA Comments at 9; NATOA Comments at 10; Palm Desert Comments at 8.

[217] We recognize that there may be situations where an otherwise qualified LPTV station asserts that it is meeting the needs of the community not being met by a full power station, regardless of the distance of that station from the LPTV station's community of license, and that LPTV station is denied carriage. In this case, the LPTV station would be free to file a complaint with the Commission so that we may consider its qualification status under these circumstances.

[218] This requirement is consistent with the customer service standards we adopt today in MM Docket No. 92-263. Under those standards, a cable operator must give its subscribers 30 days notice of any changes to its channel line-up. *See Report and Order* in MM Docket No. 92-263, adopted March 11, 1993.

[219] Section 614(c)(2).

[220] *Notice* at 8062.

relationship between the franchising authority and the cable operator's request for use of a PEG channel and proposes several specific rules relating to the use of PEG channels for meeting must-carry obligations.[221] CFA/MAP states that the franchising authority alone should be the party to decide the appropriate use of PEG channels, but they request that the Commission require the franchising authority to provide public notice of an impending decision and require the authority to vote in a public meeting on the use of such channels. NATOA also suggests that the Commission require that a franchising authority be served with all pleadings relating to issues between local stations, cable systems and the Commission.[222] In addition, some commenters express concerns regarding the use of PEG channels, including their continued availability for their intended use, the ability to displace LPTV stations if necessary,[223] the exact definition of "in use," especially concerning bulletin board use, and a recommendation that a PEG and an LPTV station be permitted to share a PEG channel.[224] Consistent with our discussion regarding the use of PEG channels for NCE carriage, we will defer all such decisions to the franchising authority.[225]

5. Sales Presentations and Program Length Commercials

72. Section 614(g) provides that a cable operator will neither be required to carry nor prohibited from carrying the signal of a commercial television station that is predominantly used for the transmission of sales presentations or program length commercials until the Commission completes a related proceeding. That required proceeding is intended to determine whether such broadcast television stations serve the public interest, convenience, and necessity and are entitled to must-carry status.[226] On January 14, 1993, the Commission initiated such a proceeding.[227] Until a final definition of "predominantly utilized for the transmission of sales presentations or program length commercials" is adopted in MM Docket No. 93-8, an interim definition is needed in order to implement Section 614(g).

73. In the *Notice*, we sought comment on whether an appropriate interim definition would be one that considers channels to be "predominantly utilized" for such purposes if more than 50 percent of their programming week consists of sales presentations or program length commercials. Adelphia and Time Warner support the proposed definition and suggest that the definition of commercial matter set forth in Section 76.225 -- "airtime used for the offering of goods or services for sale" -- might provide a means for determining what constitutes "a program length commercial" or "sales presentation."[228] INTV recommends that the definition exclude late night hours (12 midnight to 6 a.m.) to avoid misclassifying independent stations that broadcast such programming at that time.[229] Acton favors a dual test of 50 percent of the broadcast week or 50 percent of prime time hours to define such stations. [230] CFA/MAP claims that a 50 percent per day cap should also count all commercial matter carried during the programming day, including commercials during "ordinary programming."[231] In addition, Acton states that any station requesting must-carry status should certify that it is not predominantly broadcasting sales presentations or program length commercials, while Adelphia and Time Warner contend that cable operator determinations should be controlling during the interim period.[232]

74. We believe that our proposed definition of a station that is predominantly used for sales presentations and program length commercials is appropriate for use during the interim period because it is simple to apply. Accordingly, stations will qualify for this definition if more than 50 percent of their programming consists of such commercial material. We do not agree with INTV that this definition disadvantages independent stations that use such programming as their overnight service.[233] We also reject CFA/MAP's proposal to include commercials during other programming since under our broadcast system it is these commercials that make ordinary programming possible. While the definition of commercial matter in Section 576.225 describes the programming covered by this provision, it also describes traditional commercials. Thus, we will not adopt this definition. We also believe that it is generally understood that the programming in question includes sales presentations longer than traditional commercials inserted in programming. Moreover, as we do not want to burden either cable operators or broadcasters during this interim period, we will not require any additional certifications. A station whose status under this provision is disputed may seek a Commission determination of its right to carriage pursuant to the procedures described below.

C. Manner of Carriage Provisions Applicable to Commercial and Noncommercial Stations

1. Content to be Carried

75. Pursuant to Section 614(b)(3)(A) of the 1992 Act, a

[221] Palm Desert Comments at 5-7. These rules would require a cable operator to show that no alternate channel is available every six months, to demonstrate that the PEG channel is fully unused, and to move the signal within 30 days if a new channel becomes available. In addition, they also would provide that a new PEG channel will be considered to be in use for the first year.

[222] NATOA Comments at 11. NATOA also suggests that a cable operator be required to show every six months that the use of the PEG channel is still necessary, as no other channel capacity is available.

[223] CFA/MAP Comments at 10-11.

[224] CBA Comments at 13.

[225] *See* paras. 22-23, *supra*.

[226] Section 614(g)(2).

[227] *See Notice of Proposed Rule Making* in MM Docket 93-8, 8 FCC Rcd 660 (1993).

[228] Adelphia Comments at 15, Time Warner Comments at 22-23.

[229] INTV Comments at 14.

[230] Acton Comments at 16; TCI Comments at 16. Commenters proposed the same test to define "substantial duplication."

[231] CFA/MAP Comments at 13-14.

[232] Adelphia Comments at 15; Time Warner Comments at 22-23.

[233] A station that operates 24 hours a day, 7 days a week, is on the air for a total of 168 hours. Thus, under this definition, it could air such programming for up to 84 hours a week without being so classified. A midnight to 6 a.m. shopping service would only represent 42 of those permissible hours.

cable operator is required to carry, in its entirety,[234] the primary video, accompanying audio, and line 21 closed caption transmission of local commercial television stations and, to the extent technically feasible, to carry program-related material contained in the vertical blanking interval (VBI) or on subcarriers. This provision also provides that the retransmission of other material in the VBI or other nonprogram-related material shall be carried at the discretion of the cable operator. Furthermore, where appropriate and feasible, a cable operator may delete signal enhancements, such as ghost-cancelling, from the broadcast signal and employ such enhancements at the system headend. Section 615(g)(1) provides the same requirements for NCE stations, except that cable operators also must carry program-related material contained in the VBI or on subcarriers "that may be necessary for receipt of programming by handicapped persons or for educational or language purposes." The retransmission of other material in the VBI or on subcarriers of NCE stations is also at the discretion of the cable operator. In the *Notice*, we requested comment on implementation of these requirements. In particular, we proposed to draw on copyright law to decide when material in the VBI or on subcarriers is program-related. In this regard, the courts have held that the copyright of a television program includes program material encoded in the VBI when "related images" are involved.[235] We also asked whether cable systems may delete signal enhancements for noncommercial stations and reintroduce them at the headend, even though this is not specifically mentioned in the 1992 Act.

76. Some cable operators support the proposal to parallel the related copyright definition of program-related material and assert that such material should be limited to that which is freely available to all viewers. Cap Cities contends that the factors enumerated in *WGN Continental Broadcasting* should serve as a model for a broad definition of program-related material that includes information that is unlocked and receivable with the necessary peripheral equipment.[236] However, NAB asserts that this definition should not control the Commission's determinations since it is not mentioned in the legislative history.[237] It further seeks to have VBI material related to commercials considered program-related because commercials make the advertiser-supported broadcasting system possible.[238] Nielsen specifically asks that the line 22 program identification codes it uses to support its ratings service be carried.[239]

77. With respect to NCE stations, APTS states that the requirement that cable systems must carry the primary audio, video and line 21 closed caption transmissions in their entirety without exception should be made clear.[240] APTS also asserts that Congress intended program-related material to be material that is integrally, as opposed to tangentially, related to the primary programming.[241] Time Warner and Adelphia contend that Section 615(g)(1) explains, rather than expands, the definition of program-related material by stating that it "may be necessary for receipt of programming by handicapped persons or for educational or language purposes."[242] In order not to undermine the public's statutory right to have access to line 21 closed-captions, NCI advocates that Section 76.606 be kept intact and construed to require the delivery of line 21 closed captions any time they are received at the headend of a cable system.[243]

78. As noted above, cable systems need only carry program-related material on VBIs or subcarriers where "technically feasible." NCTA asks that this term not be defined beyond what is stated in the statute because technical feasibility may be affected by the particular characteristics of the equipment used by the system or the types of communications used between the system headend and other points of its facility.[244] A few cable operators suggest that, at a minimum, this provision does not require the cable operator to incur additional costs or to change equipment in order to carry such material and that any standards should consider the financial limitations of cable operators.[245] NAB and APTS contend that virtually all cable systems have the capability of retransmitting the VBI and subcarriers of broadcast channels.[246] NAB also is concerned that cable operators may design systems that make such retransmission impossible, particularly in light of the increasing uses of such services (*e.g.*, interactive television) that may compete with similar services offered by the cable system.[247] NAB adds that the viability of these new services would be jeopardized if cable systems were able to create a bottleneck that blocked viewer access to such services. Continental urges that any rules take into account the possibility that carrying material on the VBI may not be feasible in the future because of ATV, compression, or other technological advances.[248] APTS and NAB, however, argue that Commission policies should ensure that cable operators

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[234] Section 614(b)(3)(B) provides that the cable operator shall carry the entirety of the program schedule of any television station included on its system unless carriage of specific programming is prohibited, and other programming is authorized to be substituted, pursuant to Section 76.67 (regarding sports broadcasts) or Subpart F of Part 76 of the Commission's rules (regarding nonduplication protection and syndicated exclusivity).

[235] *See WGN Continental Broadcasting v. United Video (WGN Continental Broadcasting)*, 685 F.2d 218 (7th Cir. 1982).

[236] Cap Cities Comments at 18-20.

[237] NAB Comments at 22.

[238] Cap Cities Comments at 20. Cap Cities adds that this interpretation would be consistent with the *WGN Continental Broadcasting* decision and Section 614.

[239] A.C. Nielsen Company (Nielsen) Comments at 4-8.

[240] APTS Comments at 26-27. WNYC seeks an additional clarification that this requirement refers to carriage over the entire broadcast day. WNYC Comments at 15-16.

[241] APTS Comments at 26 citing House Report at 101.

[242] Time Warner Comments at 24; Adelphia Comments at 16.

[243] National Captioning Institute (NCI) Comments at 3-4. We note that the provisions of 76.606 apply to all broadcast stations, not just NCE stations.

[244] NCTA Comments at 21.

[245] Time Warner Comments at 23; Adelphia Comments at 15; TKR Comments at 9-10; Consortium of Small Cable System Operators (Small Operators) Comments at 3-4.

[246] NAB Comments at 24. In order to monitor and enforce this requirement, APTS recommends that cable operators indicate whether or not the VBIs or subcarriers are carried as part of the signal identification requirements of Section 615(k). APTS Comments at 26-27.

[247] NAB Comments at 24-25.

[248] Continental also claims that carriage of VBI information could prevent scrambling that is needed to prevent theft of service. Continental Comments at 23-24.

take into account the obligation to carry all program-related material in developing any new transmission systems.[249]

79. MSTV urges the Commission to bar any stripping of ghost-cancelling reference signals, at least until the conclusion of the line 19 rulemaking[250] and its initial implementation, in order to foster development of this technology.[251] NAB states that the Commission should require cable systems to carry the ghost-cancelling reference (GCR) signal of a local commercial television station on line 19 so that viewers can be assured of receiving the full benefit of this technology.[252] TKR submits that cable operators should be allowed to process both commercial and NCE signals uniformly to ensure the highest quality signal retransmission as long as such techniques do not detract from signal quality.[253] APTS contends that the Commission has the authority to prohibit stripping of ghost-cancelling signals from NCE stations and is concerned that any discretion granted cable operators to strip line 19 information may undermine the intent of the adoption of a universal ghost-cancelling system.[254]

80. As described above, cable operators are faced with three broad categories of the content of broadcast signals they must carry when fulfilling their must-carry obligations. First, cable operators are mandated to carry the primary video, accompanying audio and line 21 closed caption transmissions of both qualified local commercial and NCE stations. Second, cable operators are required, where technically feasible, to carry program-related material on the vertical blanking interval or subcarriers of qualified local commercial stations. Third, with respect to local qualified NCE stations, cable operators, where technically feasible, must carry program-related material that may be necessary for the receipt of programming by handicapped persons or for educational or language purposes. Lastly, the 1992 Act gives cable operators discretion to carry any other information in a station's VBI or subcarriers.

81. Two variables must be addressed for the above obligations to be put into practice: a) program-related material and b) technical feasibility. As suggested by Cap Cities' comments, we believe the best guidance for what constitutes program-related material is to be found in the factors enumerated in *WGN Continental Broadcasting*. Carriage of information on a stations's VBI is rapidly evolving; thus, we believe no hard and fast definition can now be developed. However, relying on the copyright approach followed in the *WGN Continental Broadcasting* case will provide guidance in this area. For example, we reject Nielsen's proposal that program identification codes carried on line 22 of a broadcast station's VBI be required to be carried. Program identification codes are not program-related since their presence is used to determine viewership levels. With respect to ghost-cancelling technology carried in a station's VBI, the 1992 Act permits a cable operator, where appropriate and technically feasible, to remove ghost-cancelling information carried in a station's VBI if the cable operator employs such technology at the cable system's headend.[255] Thus, ghost-cancelling technology can only be stripped from the television signal if the cable operator applies an adequate alternative methodology at the headend.

82. With regard to the "technical feasibility" of the carriage of program-related material in the VBI or on subcarriers, we generally concur with Time Warner's suggestion that such carriage should be considered "technically feasible" if it does not require the cable operator to incur additional expenses and to change or add equipment in order to carry such material. However, we would consider signal carriage to be "technically feasible" if only nominal costs, additions or changes of equipment are necessary. We believe this approach satisfies the intent of Congress. Finally, we find that the type and method of signal enhancements that may be used over and above normal processing on a cable system is best left to the cable operator.

2. Channel Positioning

83. Section 614(b)(6) provides that the signals of local commercial television stations carried pursuant to the new must carry rules must be carried on either (1) the same channel on which the station is broadcast over the air, (2) the cable channel on which it was carried on July 19, 1985, or (3) the cable channel on which it was carried on January 1, 1992. The election of which of these three alternatives to choose is left up to the station involved. Similarly, Section 615(g)(5) requires that NCE signals carried pursuant to must-carry requirements must appear on the cable system channel number on which the qualified local NCE station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the station. In either case, another channel number that is mutually agreed upon by the station and the cable operator may be selected. In the *Notice*, we recognized that, under these provisions, more than one station may seek and have a valid claim to the same cable channel. Thus, we sought comment on whether a formal priority system should be established for handling conflicts among stations and whether, in this situation, a cable operator should be permitted to make a selection within the constraints otherwise established in order to minimize disruption to consumers.[256] We also asked commenters to consider the obligation of cable operators to provide "on-channel" carriage for stations whose channel number is not encompassed, from a technical perspective, by the basic service tier.[257]

84. Commenters dispute whether the right to select a must-carry signal's channel position is at the discretion of the broadcaster or the cable operator. Broadcast interests assert that a plain reading of the statute gives stations the

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[249] APTS Comments at 28; NAB Comments at 25-26.

[250] *See Notice of Proposed Rule Making* in MM Docket 92-305, 8 FCC Rcd 90 (1993).

[251] Association for Maximum Service Television (MSTV) Comments at 4-6.

[252] To prevent this, NAB recommends that a rule be adopted which reserves line 19 of broadcast signals carried by cable systems for the GCR signal. NAB Comments at 22-24.

[253] TKR Comments at 9.

[254] APTS Comments at 30-31.

[255] While the 1992 Act is silent about the treatment of enhancements carried on the VBI of local qualified educational stations, we believe that there is no reason why these stations should be treated differently.

[256] Disputes that cannot be resolved by the affected parties are to be resolved by the Commission.

[257] For example, should a cable system with a basic tier encompassing channels 2 through 12 be required to provide on-channel carriage to a local station broadcasting on channel 50?

right to elect their channel position from among the specified choices.[258] Cable operators argue that the placement of a must-carry signal is at their discretion as long as they choose one of the options enumerated in the 1992 Act.[259] They claim that this interpretation will minimize disruption to established viewing patterns, enable operators to set out logical signal carriage line-ups and lead to the most expeditious resolution of disputes between broadcasters. In addition, Time Warner states that stations should not be able to ask for different channel positions in the different communities of a system serving more than one community and that the position chosen should hold until the next must carry/retransmission consent election date.[260]

85. Cable interests also question how they should handle existing contracts with cable programmers that may conflict with the carriage or channel positioning claims of must-carry stations. In particular, they are concerned about situations where a broadcaster's request for carriage or a specific channel position conflicts with a valid existing contract between a cable operator and a cable programming service for carriage on the basic tier and for a specific channel position.[261] Several parties suggest that we grandfather these agreements, including Viacom, which notes that the statute grandfathers existing broadcast station/cable system agreements for compensation for carriage.[262] Alternatively, Continental suggests that operators not be held contractually liable for failing to honor those contracts that are nullified by the 1992 Act.[263] Broadcast interests state that the position of cable interests on the contract abrogation issue contravenes the plain language and intent of the 1992 Act.[264]

86. As noted above, the *Notice* asked whether a formal priority structure should be established for resolving conflicts between stations claiming the right to a particular cable channel position. INTV opposes the adoption of a priority system at this time because the extent of such conflicts is unknown and the 1992 Act provides ample flexibility to allow affected stations to resolve their differences.[265] APTS rejects a formal priority system based on a survey of its members that found no clear cut channel positioning preference.[266] Most commenters supporting an FCC-imposed priority scheme favor one that gives the greatest weight to a station's over-the-air channel position.[267] They assert that: this choice minimizes viewer confusion and protects the investment broadcasters have made to publicize their channel position and identification. For commercial stations, several cable commenters favor giving priority to a station's position on January 1, 1992, because it is the most recent, would be less disruptive to consumers and would require the fewest engineering and channel line-up changes.[268] CFA/MAP states that when stations have conflicting claims on a channel position, an NCE station should be given preference.[269]

87. Cable operators argue that in cases where a must-carry signal's over-the-air channel number is higher than the number of channels comprising the system's basic tier, a cable operator should have the discretion to place the signal on a channel within its basic tier.[270] They assert that it is often technically infeasible to have basic tier channels scattered all over the cable channel spectrum, as well confusing and disruptive to subscribers.[271] NAB and other broadcast interests disagree and state that any exemption from the over-the-air channel option creates a loophole that would allow a cable system to defeat a station's election of its off-air channel position and would permit cable operators to discriminate among stations by creating basic tiers that preclude on-channel carriage of some stations.[272] In this regard, INTV asserts that current technology permits a cable system to configure a basic tier to reflect the on-channel carriage of all stations.[273]

88. Contrary to the assertions of some cable commenters, we believe that the Act clearly contemplates that the broadcaster, not the cable operator, is entitled to select which of the channel positioning alternatives will apply in its case. At the same time, the Act allows other channel positions to be chosen as long as both the station and the cable operator agree. As indicated above, cable operators will be required to begin carriage of the complement of commercial must-carry signals on June 2, 1993. We will leave the initial channel positioning to the discretion of the cable operator for an interim period beginning on that date. We encourage cable operators to continue to carry stations on their current channel positions during this interim period and, to the extent possible, to place signals that are added to comply with these rules on a channel consistent with the available options. This should avoid disruption to systems and subscribers. In this regard, we remind cable operators of their obligation to provide stations and subscribers with 30 days prior notification of changes in channel positions.[274] If a station subsequently elects must-carry when it makes its must-carry/retransmission consent election, it will be required to specify its choice of channel position at that time. However, cable operators will not be required to fulfill any channel positioning request until October 6, 1993, the effective date of our retransmission consent rules.[275] By requiring cable operators to make the

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[258] NAB Comments at 27; APTS Reply at 16; Curators of the University of Missouri Reply at 7-8.

[259] NCTA Comments at 22; TCI Comments at 22; Acton Reply at 11.

[260] Time Warner Comments at 26-27.

[261] Discovery Comments at 6-7; Viacom Comments at 7-21; Continental Comments at 20-21.

[262] Viacom Comments at 11; BET Comments at 5-6. Viacom asserts that any preemption of existing programming contracts would be an unlawful retroactive rulemaking, raising "serious constitutional implications." Viacom Comments at 10-16, citing, *inter alia*, *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), and *General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992).

[263] Continental Comments at 20-21; *accord* APTS Reply at 20.

[264] WNYC Reply at 12; NAB Reply at 19; APTS Reply at 19.

[265] INTV Comments at 15-16.

[266] APTS Comments at 32-33.

[267] *See, e.g.*, Acton Comments at 23; Cap Cities Comments at 20-21; Westinghouse Reply at 4.

[268] NCTA Comments at 22; Continental Comments at 17.

[269] CFA/MAP Comments at 14.

[270] *See, e.g.*, TKR Comments 10; NCTA Comments at 22; TCI Comments at 23.

[271] Armstrong Comments at 19; InterMedia Comments at 19; Continental Comments at 18-19.

[272] *See, e.g.*, NAB Comments at 28.; NAB Reply at 20; WNYC Comments at 11-12.

[273] INTV Comments at 16-17.

[274] *See* paras.105-110, *infra*.

[275] *See* paras. 154-155 *infra*.

needed channel line-up changes pursuant to the must-carry rules and the retransmission consent requirements at the same time, we believe that disruptions to consumer habits and system line-ups should be minimized. Moreover, we believe that the options for channel positioning incorporated in the Act by Congress are not likely to cause significant disruptions even for the interim period from the initial election to the channel positioning rule's effective date. On-channel carriage is associated with the channel by which a station is identified; the July 1985 date represents historical carriage of a signal; and, in the case of commercial stations, the January 1992 date is likely to be the station's current position. However, we will permit cable operators to deny any request for different channel positions on different segments of a single system.

89. With respect to conflicts between the carriage or channel positioning rights of a must-carry station and prior agreements between cable operators and cable programming services, we find that the provisions of the 1992 Cable Act supersede any such contracts. We note that the Conference Report indicated that in no event would any agreement concerning channel positioning entered into prior to July 1, 1990, or the expiration of such an agreement, relieve a cable operator of any must-carry requirements.[276] While the 1992 Act and its legislative history do not address contracts entered into subsequent to this date, we believe that the statute also supersedes such agreements. The fact that the 1992 Act expressly grandfathers existing contracts only in specific instances[277] demonstrates that there was no intent to generally exempt cable operators' obligations under the must-carry and channel positioning requirements. It is clear that Congress intended to give priority to the carriage of local broadcast signals by cable systems. Thus, to give full effect to this policy, Congress created a clear statutory right of carriage and channel position that applies prospectively notwithstanding the existence of prior agreements between cable operators and cable programming services.[278] Moreover, despite some cable commenters' requests, we do not believe that the Commission has the jurisdiction to exempt cable operators from contractual liability in cases where the statute supersedes existing agreements. We encourage parties to try to renegotiate such contracts and resolve any conflicts. Furthermore, we believe that the courts are the appropriate forum for handling any contractual disputes.

90. We recognize that the actual extent of conflicting claims among broadcast stations for any particular channel position is unknown at this time. We also note that the 1992 Act provides three channel positioning options for each commercial station and two for each NCE station, and also provides an opportunity for parties to develop their own solutions to conflicting claims. The record before us reveals that there is no uniform preference for channel position among broadcasters. Therefore, we decline to adopt a formal priority structure for resolving conflicting channel position claims at this time. Nonetheless, we do suggest that cable operators and affected broadcast stations give serious consideration to the value of maintaining current channel positions because this approach will be least disruptive, especially for subscribers. We believe that this approach will encourage parties to resolve disputes among themselves and minimize the number of disputes the Commission may have to handle.

91. Congress emphasized that the must-carry and channel positioning provisions are meant to protect our system of television allocations and promote competition in local markets.[279] Therefore, we believe that cable operators must comply with the channel positioning requirements absent a compelling technical reason for not being able to accommodate such requests. We do not believe that inconvenience, marketing problems, the need to reconfigure the basic tier or the need to employ additional traps or make technical changes are sufficient reasons for denying the channel positioning request of a must-carry signal. Only where placement of a signal on a chosen channel results in interference or degraded signal quality to the must-carry station or an adjacent channel, or causes a substantial technical or signal security problem, will we permit cable operators to carry a broadcast signal on a channel not chosen by the station.[280] We believe that most systems are able to configure their service to fulfill this requirement. A cable system claiming that it cannot meet a channel positioning request for technical reasons will have to provide evidence that clearly demonstrates that the operator cannot meet this requirement.

3. Signal Quality

92. The *Notice* solicited comments on whether the Commission's recently adopted *Cable Technical Report and Order*,[281] satisfies the requirements for signal quality standards specified in the 1992 Act. Section 614(b)(4)(A) specifically directs the Commission to adopt carriage standards to en-

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[276] House Committee on Energy and Commerce, H.R. Rep. No. 862 ("Conference Report"), 102d Cong., 2d Sess. (1992), reprinted at 138 Cong. Rec. H8308 (Sept. 14, 1992) at 75.

[277] *See* Sections 614(b)(10)(C), 628(h), 325(b)(6).

[278] Contrary to some cable programmers' assertions, our must-carry rules will not be applied retroactively. The rules do not provide for penalties to a cable operator or require reimbursement to broadcasters for a cable operator's past carriage or channel positioning practices under prior or existing contracts. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988); *id.* at 219 (Scalia, J., concurring) ("A rule with exclusively future effect . . . can unquestionably *affect* past transactions . . ., but it does not for that reason [become a retroactive rule]."") (emphasis in original). Nor do we believe that the effect of the 1992 Act's must-carry requirements on existing programming contracts raises constitutional problems. *See Multistate Communications, Inc. v. FCC*, 728 F.2d 1519, 1526 (1984) ("Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it."), quoting *FHA V. The Darlington, Inc.*, 358 U.S. 84, 91 (1958), and *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947)."

[279] Conference Report at 75.

[280] Should such a situation arise, we expect the cable operator and the broadcaster to negotiate in good faith and attempt to resolve the problem without Commission intervention. We thus anticipate that we will rarely be called upon to resolve such disputes.

[281] *See Report and Order* in MM Docket Nos. 91-169 and 85-38, 7 FCC Rcd 2021 (1992), (*Cable Technical Report and Order*) and *Memorandum Opinion and Order* in MM Docket Nos. 91-169 and 85-38, 7 FCC Rcd 8676 (1992) (*Cable Technical Reconsideration*).

sure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.[282] Under these requirements, the signals of local commercial television stations shall be carried without material degradation. In addition, Section 615(g)(2) requires cable operators to provide qualified local NCE television stations with bandwidth and technical capacity equivalent to that provided to commercial television stations carried on the cable system, and to carry the signals of such stations without material degradation.

93. Section 614(h)(1)(B)(iii) provides that a cable operator is not required to carry a local commercial television station that does not deliver to the principal headend of a cable system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, if the station does not agree to bear the costs of delivering a good quality signal or a baseband video signal. Similar, but slightly different, requirements are contained in Section 614(h)(2)(D) for qualified low power stations. Likewise, Section 615(g)(4) provides that a cable operator shall not be required to carry the signal of any qualified local NCE television station that does not deliver to the cable system's principal headend a good quality signal or baseband video signal.

94. Cable interests generally agree with the Commission's assessment that the comprehensive standards adopted in the *Cable Technical Report and Order* satisfy the signal quality requirements of the 1992 Act.[283] Several cable commenters state that cable operators should not have any obligation to enhance television signals received over-the-air other than to employ good engineering practices and have the proper equipment.[284] However, MSTV submits that the rules should include a requirement that, if a cable system takes any steps to improve the quality of any of its nonbroadcast signals, it must do the same for broadcast signals.[285] Nielsen urges the Commission to require carriage of the *entire* broadcast signal, including program identification or SID codes appearing in either the "primary video" or the VBI, without degradation, when implementing standards to ensure that requirements in Sections 614(b)(4)(A) and 615(g)(2) are met.[286] Furthermore, Hammett & Edison (H&E) favors additional standards that would consider material degradation to exist if the picture quality of a cable signal viewed at any downstream test point or subscriber tap, as compared with the picture quality of that same channel as received at the headend, is degraded by two or more TASO units.[287]

95. With respect to the need for additional rules to implement Section 614(h)(1)(b)(iii), cable operators state that the rules should make clear that a station's obligation to bear the costs associated with delivering a good quality signal to the system's principal headend include improved antennas, increased tower height, microwave relay equipment, amplification equipment and any tests that may be needed to determine whether the station's signal complies with the signal strength requirements.[288] CBA suggests that the provisions of Section 614(h)(B)(iii) applicable to full power television stations should also be adopted for LPTV stations;[289] similarly, Time Warner and Adelphia recommend that the commercial station standard should be adopted across-the-board. Continental states that there are some technical deficiencies in the statutory language of Section 614(h)(1)(B) and requests several clarifications and a definition of the term "signal processing equipment."[290]

96. With respect to broadcasters' payment for delivery of good quality signals, NAB states that whether a signal meets the required level depends on a number of factors unique to each cable installation. Thus, NAB contends that "good engineering practices" should be a guide to whether the cable operator has undertaken reasonable efforts to receive the broadcast signal.[291] NAB suggests that cable operators be required to notify any eligible broadcaster that does not deliver a good quality signal to the principal headend within 30 days after the effective date of the new rules. NAB states that such notification should include engineering specifications and signal measurements.[292] Under this proposal, a broadcaster would have 30 days to respond to the cable operator and would be expected to indicate whether it agrees with the signal measurements and whether it intends to pursue its must carry rights. NAB further states that a cable operator should be required to expend reasonable efforts to cooperate with the broadcaster before the remedy provisions of Section 614(d) are applied.[293] NCTA argues that the recently adopted technical rules are sufficient to ensure that operators employ good engineering practices and no further onus should be placed on the cable operator regarding signal delivery. NCTA further states that the burden should be on the broadcaster to show that the requisite standard is met.[294]

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[282] We believe it is clear from the overall context that the comparability of treatment specified is intended to be between "NTSC" broadcast and cable origination channels.

[283] Acton Comments at 19; TCI at 19; Small Operators Comments at 4; NCTA Comments at 23, Continental Comments at 25.

[284] NCTA Comments at 23; Continental Comments at 22-23; Adelphia Comments at 18; Time Warner Comments at 27.

[285] MSTV at 3.

[286] Nielsen at 9.

[287] H&E Comments at 3-6. TASO is an acronym for the Television Allocations Study Organization. This advisory group created picture impairment standards that assign numerical grades (units) to the subjective picture quality of television signals.

[288] TCI Comments at 20; Time Warner Comments at 29; Adelphia Comments at 20; Armstrong Comments at 20. In addition, Time Warner and Adelphia contend that stations that are currently carried and which assert must-carry rights under the Act need not be carried unless a good quality signal is received at the cable system's principal headend. Adelphia Comments at 20; Time Warner Comments at 29. Moreover, Armstrong and others argue that a television station's use of extraordinary means, such as microwave, to deliver a signal to the headend cannot be considered as a method to establish the must-carry status of a signal. Armstrong Comments at 20; InterMedia Comments at 20.

[289] CBA Comments at 6.

[290] Continental Comments at 21-22.

[291] NAB Comments at 6-7.

[292] NAB Comments at 29-30.

[293] NAB Comments at 30.

[294] NCTA Comments at 12.

97. As we observed in the *Notice*, the *Cable Technical Report and Order* requires cable operators to make reasonable efforts and use good engineering practices and proper equipment to guard against unnecessary degradation of broadcast television signals. The *Cable Technical Report and Order* further encourages cable operators to work with broadcasters to resolve problems affecting the quality of a particular signal prior to its reception at the cable headend. At the same time, the *Order* provides that cable operators are not required to take extraordinary measures to improve upon the quality of signals over which they have no control.

98. Given that our current technical standards adopted in the *Cable Technical Report and Order* require a cable operator to provide to the subscriber a good quality signal for all classes of cable channels, including broadcast channels, without material degradation,[295] we are not convinced that additional requirements for broadcast television stations are needed at this time, as some commenters suggest.[296] We continue to believe that our technical standards,[297] considered as a whole, ensure that cable systems will deliver a good quality picture to subscribers. In fact, additional regulations in this area may have the unwarranted effect of impeding technological advances and experimentation by the cable industry (*e.g.*, signal compression and 500-channel technology).

99. On the issue of signal levels at a cable system's principal headend, Time Warner and others comment that the standard set forth in the 1992 Act is solely a signal strength measurement (*e.g.* -49dBm for VHF and -45dBm for UHF commercial television stations), and that the 1992 Act also calls for a "good quality signal" to be delivered as well. Time Warner maintains that a signal can meet the 1992 Act's signal strength standard and yet be unwatchable.[298] It thus suggests that the signal quality standard be specified as a signal strength measurement and that we also adopt a benchmark to measure a good quality signal. In particular, Time Warner supports a measurable technical parameter that approximates a TASO Grade 2 picture (*i.e.*, a television picture with a visual signal level to undesired noise ratio of at least 43 dB) receivable at the system's principal headend.

100. We believe that the signal level measurement standard contained in the 1992 Act will generally result in a good quality television signal being received at the cable system's headend; thus, we will not adopt additional standards as Time Warner and others request.[299] However, as Time Warner notes in its comments, there may be situations where the levels of undesired signals (noise), outside of the cable operator's control, that are received at the cable system's headend adversely affect the quality of a television station's signal. We believe that, where a broadcaster's signal strength at the cable headend meets the above standard but, for reasons beyond the control of the cable operator, a good quality picture is not receivable, the broadcast station and the cable operator should initially attempt to resolve the problem. In the event that the dispute cannot be resolved, the parties may seek appropriate remedies from the Commission. The Commission, as a matter of course, will consider all relevant technical issues, including the signal-to-noise ratio as suggested by Time Warner.

101. If good engineering practices and proper processing equipment produce a signal that does not meet our technical standards at the subscriber terminals, we will require the cable operator to resolve the problem or identify the reason why it cannot provide the required level of signal quality. In so doing, the cable operator should be able to identify the problem. If the problem stems from an unsatisfactory quality local television signal received at the cable system's principal headend, the cable operator is not required to bear the burden of improving the signal; however, we expect it to cooperate with the television station to resolve the problem. Of course, if signal degradation occurs between the cable system's principal headend and the subscriber's terminal, it is the sole responsibility of the cable operator to ensure that it is operating in full compliance with the Commission's technical standards.

102. We agree with NAB's suggestion that cable operators should be required to notify any eligible broadcaster that does not deliver a signal meeting the signal strength measurements to the principal headend. Cable operators will have until May 3, 1993, to notify eligible broadcasters in writing that their station does not place an adequate signal level over a principal headend. Additionally, we will not specify the time in which the broadcaster must respond to the cable operator's notification as suggested by NAB, because it will be in the best interests of the broadcaster to respond as soon as possible for carriage on the cable system.

103. The cable operator's notification that a broadcast station is failing to deliver a good quality signal to the system's principal headend should provide the broadcaster with a list of the equipment used to make the initial measurements.[300] Additionally, the cable operator must include a detailed description of the reception and over-the-air signal processing equipment used, including sketches and a description of the methodology used by the

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[295] The signal quality at the subscriber endpoint would be affected by any intermediary point of signal reception and processing, including the receiving antennas at the headend and any cable system processing points in-between. "Material degradation" in these circumstances refers to degradation beyond the normal operations and processing and transmission of signals on the cable system.

[296] *See, e.g.*, H&E Comments at 3-6. Nielsen urges the Commission to require the carriage of the *entire* broadcast signal, including program identification or SID codes appearing in either the "primary video" or VBI, without degradation. Nielsen Comments at 9. As discussed earlier, we decline to require the carriage of program identification codes. However, if the cable operator elects to carry such program identification codes, we expect that they be carried without material degradation.

[297] Those standards are set forth in Section 76.605 of our rules.

[298] For example, a signal may be rendered unwatchable by ghosting, excessive noise, electrical interference or for reasons wholly beyond the control of the cable operator.

[299] To determine whether an adequate signal level is delivered to a system's principal headend, the Act mandates that measurements be taken at the input terminals of a system's signal processing equipment. In this regard we believe that such measurements should be taken at the input to the first piece of active processing equipment relevant to the signal at issue.

[300] As noted above, the cable system should make its signal level measurements at the input to the first active component of the signal processing equipment relevant to the signal at issue. *See* note 299, *supra*.

112. Several commenters assert that the Commission should make it clear that must-carry eligibility is contingent upon thepH broadcaster paying any and all copyright fees.[328] NAB and others suggest that the rules we adopt should accurately reflect the cable royalty structure.[329] For example, United Video asserts that the rules should state that the date the station is added to the cable system determines the copyright royalty rate for that station.[330] MPAA recommends that the Commission's rules take into account the copyright royalty accounting periods when setting dates for must-carry election since a station would need to pay for an entire six-month period even if carried for only part of that period.[331] Moreover, NAB asserts that any disputes regarding these matters should be resolved in the courts.[332]

113. A number of cable interests explain that copyright liability is determined by the number and type of distant signals carried and request the right to designate which signal is responsible for which incremental cost. They claim that otherwise each broadcaster will claim to be responsible for the lowest amount.[333] In addition, cable operators seek the authority to secure copyright indemnification in advance and impose reasonable measures on broadcasters, such as placing funds in escrow.[334] Acton and TCI argue that broadcasters must not be allowed to restrict their carriage requests to particular communities in a system to avoid or limit their copyright liability since operators are under no obligation to trap any signal within a single system.[335] NCTA asks us to clarify that a partially local signal must pay the copyright costs associated with adding carriage of that particular station to the system's line-up.[336] NAB states that, since the actual amount of additional royalties to be paid cannot be determined until gross receipts are known at the end of the six-month period, cable operators should be required to send the distant station a bill for that portion of the royalties that represents carriage of the last-added station.[337]

114. With respect to copyright indemnification, we expect cable operators and broadcasters to cooperate with each other to ensure that operators are compensated for the cost of carriage of "distant" must-carry signals and that broadcast licensees pay only their fair share. We note that the 1992 Act in Section 614(b)(10)(B) refers to the "increased copyright liability resulting from carriage of such signal." In addition, the legislative history indicates the payment from a television station represents the "incremental copyright charges incurred by the cable system from carriage of such a station."[338] Thus, a broadcaster may only be responsible for the increased copyright costs specifically associated with carriage of its station as a must-carry signal. For example, if a station requesting must-carry status is the third distant signal carried by the system, it may have to indemnify the cable system for the difference in copyright liability between carriage of two and three distant signals. We believe that stations should be counted in the order they satisfy all the necessary conditions for attaining must-carry status. We further believe that it is reasonable for a cable operator to receive a written commitment from a broadcaster that ensures that the payments will be made once the actual amount of copyright liability is determined. In return, we find it fair to require a cable operator to provide the broadcaster with an estimate of the expected copyright liability based on previous payments and financial information.

3. Remedies

115. *Procedures.* Section 614(d)(1) and Section 615(j) of the 1992 Act provide for the resolution of carriage and channel positioning disputes between a broadcast station and a cable operator. With respect to commercial stations, the Act requires a local commercial station to notify the cable operator of an alleged violation, and further requires the cable operator to respond, prior to that station filing a complaint with the Commission. With respect to NCE stations, the Act permits an NCE station to file a complaint with the Commission prior to notifying the cable operator. In either situation, once a complaint is filed, the Commission has 120 days to either dismiss the complaint or take remedial action. The *Notice* sought comment on the implementation of these remedial provisions, including the difference in treatment of local commercial stations and NCE stations, and the necessary procedural rules relating to the filing of either type of station complaints.

116. We first discuss the procedural requirements that will govern all aspects of the remedial provisions of Sections 614(d)(1) and Section 615(j). In considering the procedural needs of such a remedial provision, the *Notice* sought comment on whether the special relief procedures of Section 76.7 should be used, with modified time periods, or whether the standard notice and comment procedures

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29; Adelphia Comments at 20. We do not agree with this interpretation of the grandfathering provision for existing agreements. *See* para. 89, *supra*. Rather, we believe that only those agreements between cable operators and broadcasters regarding carriage or channel position that were entered into before June 26, 1990, may continue for stations electing must-carry status.

328 United Video Comments at 9; TCI Comments at 11-12; Acton Comments at 11-12. NBA/NHL seeks a clarification that the payment of a cable system's incremental copyright fees by a distant signal that is not located in the same area as the cable system cannot cause that distant signal to be considered local for must-carry purposes. For example, NBA/NHL states that, even if WTBS, Atlanta, Georgia, were willing to pay the copyright fees incurred by a New York cable system, WTBS cannot be considered local for that system for must-carry purposes. NBA/NHL Comments at 4. We agree with this analysis. A signal must first qualify as a local signal for must-carry purposes and then, if copyright liability would be incurred by its carriage, the station would have the opportunity to indemnify the system in return for must-carry rights.

329 NAB Comments at 31. NAB further observes that the determinations of whether a signal is local or distant for copyright liability is based on the pre- *Quincy* must-carry rules which are not readily available. Therefore, NAB suggests that they be included in the new must-carry rules. NAB Comments at 6.

330 United Video Comments at 9.

331 MPAA Comments at 8-9.

332 NAB Comments at 33.

333 TCI Comments at 12-13; Acton Comments at 12-13; Armstrong Comments at 20-21; InterMedia Comments at 20-21; TeleCom Comments at 22-23.

334 Acton Comments at 13; TCI Comments at 13; NCTA Comments at 11.

335 Acton Comments at 12; TCI Comments at 12.

336 NCTA Comments at 11.

337 NAB Comments at 31-34. In addition, NAB recommends that cable system operators provide copies of their Statements of Account for the three preceding accounting periods to stations subject to Section 614, so the stations can estimate the amount of copyright liability that they must indemnify.

338 Conference Report at 71.

should be relied upon. The *Notice* also asked whether the fee requirements of Section 76.7 should be waived since Mass Media complaints are not subject to filing fees under the Communications Act.[339]

117. Some cable commenters state that use of the procedures established by Section 76.7 would be appropriate, while some broadcast interests assert that special relief procedures should be applied with flexibility.[340] Commenters opposing the use of Section 76.7 did not make any recommendation as to what procedural rules should be applied.[341] Broadcast parties generally state that no fees should be required, as stations which are deprived of their statutory carriage rights should not be burdened with a fee as a pre-condition for relief.[342] Other commenters assert that any fees should be paid by the losing party, or if the Commission finds itself overburdened with frivolous complaints, then a fee may be appropriate if refundable for valid complaints.[343] We are also reminded that noncommercial stations are generally exempt from fee provisions by Section 1.1112 of the Commission's rules.[344]

118. We believe that the special relief procedures of Section 76.7 provide a good framework for expediting complaints filed pursuant to Sections 614(d)(1) and 615(j). Notice and comment rule making proceedings are inappropriate, as the remedial provisions for must-carry disputes do not require any amendment of rules. Because of the 120-day time limit for a ruling on the must-carry obligations of the parties, time is of the essence. Therefore, in order to conform the current provisions of 76.7 to time frames we believe are necessitated by the 1992 Act with respect to both must-carry complaints and other requests for special relief, we are amending Section 76.7 in this proceeding.[345] Although the procedures set forth in Section 76.7 will apply, rather than filing petitions for special relief, we believe it is more appropriate for parties to file complaints, as the statute explicitly refers to the filing of complaints, not petitions for special relief. We have therefore amended Section 76.7 to accommodate the filing of complaints pursuant to Sections 614 and 615 of the Act. In this regard, parties filing such complaints will not be subject to the fee provisions of our rules or of the Communications Act normally applicable to special relief petitions.

119. *Initial Notice.* Section 614(d)(1) provides that whenever a local commercial television station believes that a cable operator has failed to meet its must-carry obligations, the station must notify the operator, in writing, of the alleged failure. The broadcast station is required to identify its reasons for believing that the cable operator is obligated to carry the signal or has otherwise failed to comply with channel positioning or repositioning or other requirements.[346] Although the station's notice to the cable operator is required by the Act, it is a preliminary requirement and is therefore not immediately governed by Section 76.7. However, we recommend that a commercial station's initial notification to the cable operator of an alleged failure to comply with must-carry or channel positioning be made with the same level of specificity, raising all issues, as the station would raise before the Commission if the request should be denied. This initial notification will act as a condition precedent to a commercial or LPTV station filing a complaint with the Commission, and will serve as a primary part of the pleadings in the event a complaint is filed.

120. *Cable Response.* Section 614(d)(1) requires that the cable operator respond to a written request from a commercial or LPTV station within 30 days of its receipt. Commenters did not make specific recommendations with respect to such response. We believe the response provided by the cable operator to a commercial or LPTV station should contain the same level of specificity, as well as all affirmative defenses, as the cable operator would raise before the Commission in defense of a complaint against it.[347] This initial response will serve as a primary part of the pleadings in the event a complaint is filed by an aggrieved commercial or LPTV station.

121. *Commercial or LPTV Complaint.* Section 614(d)(1) states that "[a] station that is denied carriage or channel positioning or repositioning by a cable operator, or that does not receive a timely response from the cable operator, may file a complaint with the Commission describing how the cable operator has failed to meet its obligations and the basis for the station's allegations." All such complaints shall adhere to the requirements of Section 76.7 of our rules. As discussed above, the complaint shall include a copy of the initial request sent by the commercial station to the cable operator and the response received from the operator, if any. If no response was received from the cable operator, the complaint should state this as well.

122. *NCE Station Complaint.* With respect to an NCE station, although the statute gives the NCE station the right to directly file a complaint with the Commission, it is anticipated, though not required, that if there is any question relating to the carriage obligations of the cable system, the NCE station will make inquiries of the cable system prior to filing a complaint.[348] In the event the NCE station chooses to notify a cable operator of an alleged failure to comply with the Act, we believe it appropriate that they use the procedures outlined for commercial or LPTV sta-

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[339] *Notice* at 8064.

[340] Adelphia comments at 21; Time Warner Comments at 30; CBA comments at 12; APTS Comments at 38.

[341] NAB Comments at 35.

[342] NAB Comments at 36; CBA Comments at 12.

[343] Adelphia Comments at 22; Time Warner Comments at 31; INTV Comments at 18.

[344] APTS Comments at 39.

[345] In our *Report and Order* in MM Docket No. 82-434, 7 FCC Rcd 6156 (1992), *recon. denied* 8 FCC Rcd 1184 (1993), we revised the cable cross-ownership rules to permit ownership of cable systems by national television networks in certain circumstances. In that proceeding, the special relief rules were amended to provide revised filing deadlines for petitions concerning the discontinuance of carriage or repositioning of broadcast stations by cable systems owned by networks and added a requirement that a television station must be notified at least 30 days before its signal is deleted or repositioned by such cable operator. Pursuant to the 1992 Cable Act, the relevant provisions herein will supersede modifications made in that proceeding. Thus, as set forth in Appendix C, we will amend Section 76.7 and eliminate Section 76.63.

[346] *Notice* at 8064 n.48. In the *Notice*, we stated that we believed it appropriate to afford qualified LPTV stations the same rights as a local commercial station. Commenters did not address this issue; accordingly, all references to commercial television stations herein will include qualified LPTV stations.

[347] *See* 47 C.F.R. § 76.7(d).

[348] In its comments, APTS states that in order for a NCE station to be fully apprised of its rights, the cable operator

tions.[349] If it so chooses, the NCE station should also notify the cable operator that it is availing itself of those procedures and that it anticipates receiving a response from the cable operator within 30 days. In the event the NCE station chooses to avail itself of the plain language of the statute and file a complaint directly with the Commission without prior notification to the cable system, the NCE station must serve the cable system as provided in Section 76.7 of our rules.

123. *Time Limits.* The *Notice* proposed a 30- or 60-day time limit from an affirmative action by a cable operator (*e.g.*, discontinuing carriage, repositioning, refusing carriage upon request)[350] in which to allow stations to file complaints. The *Notice* also proposed that a station be permitted to file a complaint at any time immediately following such an action by a cable operator, without having to wait for the time period to elapse.[351] Broadcast comments indicate that no time limit should be established; because the station is the party who suffers by any delay, it will have an incentive to file as soon as it is aware that its rights may be or have been violated.[352] There was concern, however, that a station may not be aware of certain rights and therefore not aware of some specific action that would trigger the start of the time period for filing a complaint.[353] Cable interests state that there should be a time limit for stations to file complaints, and most suggest a 30-day limit after the triggering event occurs.[354] Cable commenters also contend that since Section 614(b)(9) requires that a cable operator provide 30-day written notice to a station prior to deleting or repositioning such station, that notification by the operator of such a proposed change should be the trigger for a station to file a complaint and that the station should be required to file the complaint within 30 days of the receipt of such notice from the operator. Time Warner states that complaints should be filed within 120 days of notice from a cable operator, either of its intent to make a change or its refusal to grant a written request of the station.[355]

124. We believe that a time limit for the filing of a must-carry or channel positioning complaint is appropriate. A broadcast station (commercial, LPTV or NCE) has no interest in resting upon its rights to carriage or channel position under the terms of the 1992 Act. Concurrently, a cable system has no interest in having its obligations to stations for their carriage or channel positions remain uncertain. Most importantly, subscribers have an interest in certainty of service and minimal disruption. Therefore, we believe it appropriate that a station be required to file its complaint within sixty (60) days of an "affirmative action" by a cable operator which directly affects the rights and interests of the station. The requirement for an affirmative action by the cable operator will ensure that a station is aware of its rights or the potential loss of rights when the time period for filing complaints commences. An affirmative action for these purposes would include a denial from a cable operator in response to a demand by the station for either carriage or channel position, or the failure to respond to such a demand within the required 30-day time frame. Section 614 requires that a commercial station notify a cable operator of an alleged failure to comply with the Act, and allows 30 days for the operator to respond; therefore, the time period for filing a complaint would expire 60 days after the date the cable operator's denial of a demand is received by the broadcaster or the date such response is due. This requirement applies even if the cable operator first notifies the station of its intent to reposition the channel or discontinue carriage. Upon receipt of such a notice, the station must then notify the operator that it believes such action will violate the Act. The cable operator is obligated to respond; however, the 60 day period for filing complaints will commence on the day the response is due, whether or not a response is received by the station. The station need not wait the 60 days if a response is received prior to the expiration of such time. With respect to commercial stations, no complaints will be accepted if filed more than 60 days after the date of the response from the cable operator was due. With respect to NCE stations, no complaints will be accepted if filed more than 60 days after the station became aware, through some affirmative action of the cable operator, that such operator had allegedly violated the Act.[356]

125. *Opportunity to Respond.* The *Notice* suggested that cable operators be given ten (10) days to reply to or oppose a must-carry complaint filed with the Commission by either a commercial/LPTV station or an NCE station.[357] Both cable interests and broadcasters respond similarly with respect to the opportunity of a cable operator to answer an

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should be required to provide all stations potentially entitled to must-carry a notification that contains all necessary information for the determination of must-carry rights. APTS Comments at 25. Consistent with paragraphs 10 and 25, *supra*, we are requiring the cable operator to send a notice to qualified NCE stations with respect to the location of the cable system's principal headend and we are requiring each system to maintain a list of the signals carried pursuant to must-carry requirements in its public file. Any additional information required by a broadcaster must be requested on an individual basis.

[349] APTS suggests that the NCE station may notify the cable operator that it demands a response within 20 days. The Act does not require the NCE station to notify the cable operator prior to filing a complaint, nor does it require the cable operator to respond to such a notification. However, we believe that a notification with a request for response within a reasonable period of time (20-30 days) should be given due consideration by the cable operator.

[350] Such a triggering action would also include a unsatisfactory response or no response from a cable operator after a notice from the station of an alleged violation or a request for channel position or carriage.

[351] *Notice* at 8064.

[352] INTV states that only the basic statute of limitations applicable to any alleged violation of the Communications Act should be applied. INTV Comments at 18.

[353] APTS Comments at 39, Reply Comments at 23; NAB Comments at 34; INTV Comments at 18.

[354] Armstrong Comments at 21; Intermedia Comments at 21; Adelphia Comments at 22; Tel-Com Comments at 23; TKR Comments at 11.

[355] Time Warner Comments at 31.

[356] A written request by an NCE station to a cable operator for the list of must-carry stations contained in operator's public file will not be considered notification of a failure to comply with the Act. However, receipt by the NCE station of such a list (which the operator is required to provide within thirty (30) days of a request) may constitute the specific event triggering the 60 day time frame in which to file a complaint, if such list contains the information on which the NCE station will base its complaint.

[357] *Notice* at 8064.

NCE filed complaint. The overwhelming response was that the cable operator should be given 20 to 30 days to file a reply or opposition to a complaint filed with the Commission by an NCE station, as there would have been no other prior notice of the complaint.[358] With respect to commercial television station complaints, which have been preceded by a notice to the cable operator, both Acton and TCI state that the time specified to reply to or oppose a complaint should be 30 days.[359] In reply comments, APTS asserts that it believes that 30 days would be appropriate for filing a reply or opposition.[360] As noted above, the amended provisions of 76.7 will be applied to all complaints. We believe that the twenty (20) day opportunity to reply to or oppose a complaint set forth in that rule will be sufficient time for cable operators to react to either a commercial or NCE station complaint.

126. *Remedial Action.* Within 120 days after the date a complaint is filed with the Commission, the Commission must make a determination regarding the must-carry obligations of the cable operator. If the Commission determines that the cable operator has complied with the requirements of the 1992 Act, it shall dismiss the complaint (Sections 614(d)(3) and 615(j)(3)). If the Commission agrees with a commercial or LPTV station's complaint, it will order the cable system to either reposition the station or, in a case of refusal for carriage, to begin or resume carrying that station and to continue such carriage for at least 12 months.[361] With respect to remedies for NCE stations, Section 615(j)(3) provides that the Commission shall take such remedial actions as are necessary.

127. Cable commenters state that they will require 90 days to implement a must-carry order issued by the Commission.[362] They claim that they need time to give the proper notification to affected stations pursuant to the Act, and they must have time to notify subscribers and billing agencies.[363] Broadcasters argue that the cable operator should be required to implement a must-carry order or channel positioning order within 45 days, which is the same time period agreed to in the Standstill Order[364] adopted in litigation challenging the constitutionality of the must-carry provisions of the Act.[365] No commenters made specific recommendations with respect to remedial action to be taken when an NCE station is found to have been denied its rights.

128. We believe that 45 days is an appropriate amount of time for the cable operator to implement any order of the Commission however, we reserve the right to reduce or extend such period of time where warranted by the circumstances of a particular case. Since a cable operator will have been notified of the potential for a Commission order, it should be prepared to make necessary adjustments by the time an order is released. While the NCE provisions of the statute appear to contemplate that the Commission will fashion remedies and compliance dates on a case-by-case basis, we anticipate that carriage orders relating to NCE station complaints will carry the same 45-day deadline.

III. RETRANSMISSION CONSENT

129. The new Section 325(b) of the Communications Act provides that, as of October 6, 1993, "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except--(A) with the express authority of the originating station; or (B) pursuant to section 614, in the case of a station electing, in accordance with this subsection, to assert the right to carriage under such section." The new subsection contains four exceptions to the retransmission consent requirements, and it directs the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614, and such other regulations as are necessary to administer the limitations contained in paragraph (2)," (*i.e.*, the four exceptions). This section of the *Report and Order* addresses implementation of retransmission consent.

A. Definitional Issues

130. The Cable Act's retransmission consent provisions apply, with certain exceptions, to cable systems and other multichannel video programming distributors ("multichannel distributors"). A multichannel distributor is "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service (MMDS), a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 1992 Cable Act §602(12). All multichannel distributors must, as of October 6, 1993, obtain retransmission consent in order to carry broadcast signals, subject to the exceptions enumerated in Section 325(b) and, for cable operators only, subject to the must-carry provisions. Commenters generally agree that the definition of "multichannel distributor" should be interpreted expansively, since such distributors are "not limited to" the categories specifically enumerated.[366] Commenters raise definitional issues with regard to satellite carriers, with

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[358] Adelphia Comments at 21; Time Warner Comments at 31; Intermedia Comments at 21; Tel-Com Comments at 24. TKR states that cable operators should have 30 days to respond to all complaints. TKR Comments at 11.

[359] Acton Comments at 26; TCI Comments at 26.

[360] APTS Reply Comments at 22.

[361] Section 614(d)(3). Acton and TCI state that the decision made by the cable operator with respect to carriage or channel positioning should be given substantial deference, as the cable operator is in the best position to determine the appropriateness of each request received. They state that such a decision should be overturned by the Commission only if it is found to be arbitrary and capricious. WNYC, however, points out that there is no basis in law for giving the judgments of cable operators any deference. We agree. Congress gave the Commission the sole authority for determining the rights and obligations of stations and cable operators, once a dispute has arisen. We do not believe that deference should be afforded to any party, as all decisions will be based on the evidence presented.

[362] Armstrong Comments at 23; InterMedia Comments at 23; Tel-Com Comments at 25-26.

[363] Tel-Com Comments at 25.

[364] *See Turner Broadcasting Systems, Inc. v. FCC*, C.A. Nos. 92-2247, *et al.* (D. D.C. Dec. 9, 1992) (Standstill Order).

[365] APTS Reply Comments at 30.

[366] MPAA Comments at 4-5; Cap Cities Comments at 22-25; Adelphia Comments at 23-26.

regard to the treatment of master antenna television (MATV) systems. andH&R with regard to the status of video dialtone providers.

131. A satellite carrier, as defined in the Satellite Home Viewer Act of 1988, is an entity that uplinks a broadcast signal and retransmits it over satellite facilities that the carrier may own or lease. *See* 17 U.S.C. §119(d). Satellite carriers' customers are home satellite dish (HSD) households. The carriers themselves sell retransmitted broadcast signals directly to HSD households, but they also license a variety of agents (*e.g.*, program packagers, equipment distributors, and satellite equipment retailers) to sell the signals on their behalf. As noted above, the definition applies to a "television receive-only satellite program distributor." In order to resolve any potential ambiguity regarding responsibility for securing retransmission consent, and in view of the fact that the satellite carrier is the entity entitled to the compulsory license granted by 17 U.S.C. §119, we find that, with respect to HSD sales, the satellite carrier is the multichannel distributor and must secure retransmission consent.[367]

132. Several commenters address application of the multichannel distributor definition to SMATV, MATV, and MMDS. MMDS is, of course, explicitly included in the statutory definition. As noted above, the list of multichannel distributors in the definition is not meant to be exhaustive, and the legislative history clearly indicates that Congress intended SMATV systems to be included.[368] Accordingly, we find that SMATV systems also are multichannel distributors. However, the question of whether MATV systems are multichannel distributors, particularly when they are combined with SMATV or MMDS service, is more difficult.

133. Several commenters assert that a "standalone" MATV system, particularly if it is available without separate charge to all residents of a building or guests at a hotel or motel, is not a multichannel distributor and does not need retransmission consent for retransmitting local television broadcast signals.[369] In many cases, however, MATV systems are combined with MMDS or SMATV service to provide a package of programming that includes both local television broadcast signals and other channels. In some cases, MMDS operators equip individual dwellings with a VHF/UHF antenna along with the antenna required for receiving services retransmitted via microwave channels.[370]

134. Providers of such combined services argue that they should not be subject to retransmission consent. For example, the Wireless Cable Association believes that "wireless cable systems are under no obligation to secure retransmission consent where they receive broadcast signals utilizing a VHF/UHF antenna at the subscribers rooftop and merely relay the signal to the subscriber's set."[371] Liberty Cable, a SMATV operator, asserts that the use of MATV facilities by a SMATV operator to serve a multifamily building "is not retransmission' of broadcast signals requiring retransmission consent under the Act."[372] On the other hand, Time Warner argues that "[W]here a SMATV, MATV, MMDS, or other multichannel video service provider distributes broadcast signals along with any other video programming service offering which is available for purchase, the retransmission consent provisions clearly require the consent of the broadcast stations involved."[373] NCTA agrees, proposing that "in order to avoid conferring an unintended economic advantage on one competitive provider of multichannel video service over all others," the Commission should find that "if MATV service is combined with other services (such as satellite or microwave delivered signals), then it should be subject to retransmission consent requirements."[374]

135. We find that local broadcast signals provided by MATV facilities or VHF/UHF antennas on individual dwellings situated within the station's broadcast service area are not subject to retransmission consent, provided that these signals are available without charge at the residents' option.[375] This finding applies to standalone MATV facilities, which we find are not multichannel distributors (provided that the service is not made available "for purchase") and to MATV-SMATV combinations, as well as MMDS-SMATV and MMDS-individual antenna combinations. Our finding is based on an analogy between the installation by an individual of an antenna to receive local broadcast signals and the installation of a similar antenna by a building owner or by an MMDS operator on behalf of a building owner or individual.[376] Therefore, in order to be

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[367] Satellite carriers generally also retransmit television signals to cable systems. With respect to cable subscribers, it is the cable operator rather than the satellite carrier that is the multichannel distributor.

[368] The Conference Committee adopted the definition of multichannel video program distributor contained in the Senate bill (Conference Report at 58). The Senate Report (at 71) comments that "[E]xamples of multichannel video programming distributors include wireless cable and satellite master antenna television." *See also* NCTA Comments at 25. Liberty Cable Comments at 4-6.

[369] *See* NAB Comments at 38 ("the simple operation of a collective antenna in an apartment building to receive local television signals does not involve the redistribution of broadcast signals, and the consent of those local stations would not be required"). *See also* NCTA Reply at 20 ("where a landlord merely erects a master antenna on an apartment building for use of its tenants -- then we do not believe that Congress intended retransmission consent requirements to apply")

[370] *See* Wireless Cable Association Comments at 3, 12; Liberty Cable Comments at 9-10; Spectradyne Comments at 5-10.

[371] Wireless Cable Association Comments at 4. The Association cites in support of this proposition the Senate Report's statement at 26 that "[B]roadcast signals will remain available over the air for anyone to receive without having to obtain consent."

[372] Liberty Cable Comments at 9.

[373] Time Warner Comments at 33-34. In support, Time Warner cites the Senate Report at 34, which states the Committee's belief that "Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means."

[374] NCTA Comments at 20.

[375] This classification is analogous to that of the Copyright Act of 1976. That Act provides an exemption from copyright liability for a service that "consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission..." 17 U.S.C. §111(a).

[376] We have used this analogy before in declining to include MATV systems in our definition of cable system. See *First Report and Order* in Docket No. 20561, 63 FCC 2d 956, 996-97 (1977).

exempt from retransmission consent, the antenna facilities must be owned by the individual subscriber or building owner. They must not be under the control of the multichannel distributor. The multichannel distributor will therefore be unable to terminate or otherwise limit the availability of local broadcast signals to individual residents. MMDS and SMATV systems are, of course, multichannel distributors under the Act. They must, therefore, *inter alia*, obtain retransmission consent for any local or distant television broadcast signals (other than superstations) that they deliver via satellite or microwave channels.

136. Several commenters support our tentative conclusion that a pure video dialtone provider would not be considered a multichannel distributor[377] and would therefore not be responsible for obtaining retransmission consent.[378] Rather, the customer of the video dialtone provider, *i.e.*, the entity actually choosing and obtaining the programming, would be requiredpUto obtain retransmission consent. Since a video dialtone provider is merely offering common carrier transport service, with no discretion or control over the content, it is not appropriate to hold that provider responsible for obtaining the consent of the originating station or stations. That responsibility should fall upon the entity choosing the programming and receiving the subscription fees for providing it.[379]

B. The Scope of Retransmission Consent

137. This subsection addresses the applicability of retransmission consent to radio stations, to low power television stations, to distant non-superstations, and to foreign stations. It also examines some issues relating to the scope of the four retransmission consent exceptions.

1. Radio

138. Commenters were divided on the question of whether Congress intended radio stations to be subject to retransmission consent. Commenters arguing against inclusion of radio stress two points. First, they note that radio is not explicitly mentioned anywhere in the Cable Act or the Conference Report, while there is extensive discussion of television and affirmative instructions to the Commission to develop procedures allowing television stations to exercise retransmission consent rights.[380] Time Warner expands on this argument, asserting that the findings in Section 2 of the Act that provide the justification for must carry and retransmission consent, in particular Section 2(a)(19), stress the role of television stations in cable service as the impetus for these new provisions.[381] Second, NCTA suggests that radio retransmission consent would be impractical, since some cable operators receive and retransmit the entire band of terrestrial radio signals. It asserts that, if only one radio station were to refuse retransmission consent, this could, in practice, block cable's access to all radio signals.[382]

139. On the other hand, NAB points to the plain language of Section 325(b)(1), which prohibits retransmission of "the signal of a broadcasting station" without the express authority of the originating station.[383] There are limited exceptions to this, including exceptions for noncommercial broadcasting stations and certain satellite-delivered broadcast stations but not including radio stations. NAB also cites the Senate Report's discussion of the debate on the Radio Act of 1927. The discussion therein of the forerunner of Section 325 contains a reference to "the 'wired wireless,' which appears to have been a reference to an early form of cable transmission of radio signals." The Senate Report also describes the 1992 Act's retransmission consent section as closing "a gap in the retransmission consent provisions which, in the Committee's view, was not intended by the drafters of the 1934 Act." NAB argues that, since there were no television signals in 1934, the Committee must have had radio in mind. After careful consideration, we conclude, based on the plain language of Section 325(b)(1) and the legislative history cited by NAB, that radio is covered by the 1992 Act.

2. Low Power Television Stations

140. Although no commenters addressed the issue, we find that multichannel distributors may not retransmit the signals of low power television (LPTV) stations without the stations' consent. In other words, LPTV stations have retransmission consent rights. LPTV stations are, in fact, television broadcast stations, and the 1992 Act affords them limited must-carry rights. Hence, we conclude that LPTV stations cannot be retransmitted without consent, unless they are carried pursuant to must-carry status.

3. Exceptions to the Retransmission Consent Requirement

141. As stated in the *Notice*, there are four exceptions to the retransmission consent requirement. It does not apply (1) to noncommercial broadcasting stations, (2) to HSD reception of superstations, provided that the signal was retransmitted by a satellite carrier on May 1, 1991, (3) to HSD reception of network stations, provided the reception is by an unserved household, and (4) to superstation retransmission by cable operators or other multichannel dis-

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[377] We make this determination in the context of the Cable Act's retransmission consent provisions only. We make no decision herein regarding the status of video dialtone providers under other sections of the Cable Act.

[378] Bell Atlantic Comments; GTE Reply, United States Telephone Association (USTA) Reply at 1-2.

[379] GTE suggests an amplification of this finding, calling attention to the possibility that a television broadcast station might itself directly acquire transport services from a video dialtone provider. GTE suggests that, in this case, the station itself is the "multichannel distributor" and may be presumed to have given itself retransmission consent. *See* GTE Reply Comments. Notwithstanding the fact that the provider may be providing only one channel, we endorse GTE's suggestion.

[380] *See* NCTA Comments at 25; United Video Comments at 11. Acton Comments at 36.

[381] Time Warner Comments at 36-38. *See also* American Society of Composers, Authors, and Publishers *et al.* (ASCAP) Reply at 12.

[382] NCTA Comments at 26. NCTA does not explain why it would be impractical to filter out radio stations that did not grant retransmission consent. Presumably, this assertion is based on NCTA'a assessment of the cost of filtering equipment relative to the value that subscribers place on cable delivery of local radio signals.

[383] NAB Comments at 39-40. *See also* National Basketball Association and National Hockey League (NBA/NHL) Comments at 8, New Jersey Broadcasters Association and Oklahoma Association of Broadcasters Reply at 1-5.

1. Must-Carry/Retransmission Consent Election and Implementation

150. The statute is clear that the retransmission consent provisions become effective on October 6, 1993. Section 325(b)(3)(B) states that the Commission's retransmission consent regulations shall require that television stations make an election between must-carry and retransmission consent "within one year after the date of enactment" of the 1992 Cable Act and every three years thereafter. We believe that the instruction to provide for an election within one year gives us discretion to require that the election be made before October 6, 1993. Commenters generally support this conclusion, but differ on when the election should be made. NAB suggests requiring the initial election by August 2, 1993, while NCTA urges that the deadline be no later than June 1, 1993. By and large, cable interests favor early deadlines and broadcasters favor later ones.

151. Many commenters advocate some coordination between the retransmission consent elections and the compulsory license copyright royalty accounting periods (which are January 1-June 30 and July 1-December 31 of each calendar year). There is general agreement that subsequent triennial elections should become effective on January 1 or July 1 and that the election deadline should be three months before the election actually goes into effect. However, synchronizing the initial election with copyright royalty accounting periods is more difficult. The statute requires that retransmission consent take effect on October 6, 1993. Even if the Commission wished to do so, we could not delay it until January 1, 1994. Moreover, even with an early election, there is nothing to force stations and cable operators to reach retransmission consent *agreements* prior to October 6, 1993. Hence, cable systems may end up dropping and adding some signals in the middle of the July 1-December 31, 1993 accounting period. The possibility of this happening could be reduced if the retransmission consent election is made prior to July 1, 1993. However, cable operators will be required to give 30 days notice to any television broadcast stations that they intend to drop.[402] Hence, any decisions regarding signal carriage during the July-December 1993 accounting period would have to be made based on elections made prior to June 1, 1993. This is under three months from adoption of our retransmission consent rules and even less than that from public release of those rules.

152. These factors lead us to conclude that it is not realistic to require an election early enough to have a significant impact on cable operators' decisions regarding the second half accounting period for compulsory license payments.[403] Since carriage for any part of an accounting period incurs copyright liability for the whole period, our attention now switches to the October 6, 1993 effective date for retransmission consent. Our interest here is to ensure that a reasonable time is available for retransmission consent negotiations, for notification of any stations that might be dropped from cable systems, for notification of subscribers regarding channel deletions or repositioning,[404] and for the necessary technical and other adjustments (*e.g.*, changing traps, changing program guides, changing customer bills) to take place.

153. With regard to must-carry rules, we tentatively concluded that we would not delay the rules' effective date until October 6, 1993, but that some period of time after adoption would be appropriate to allow cable operators to come into compliance. Broadcast commenters generally favor prompt implementation of the rules. NAB indicates that full compliance should come within 60 days of adoption of the new rules, *i.e.*, by early June of 1993. Cable commenters argue that must carry and retransmission consent should take effect at the same time, in order to avoid the cost and consumer confusion and inconvenience of two major channel lineup changes within a short period of time.[405] While we seek to avoid unnecessary cost and inconvenience that may result from changes in channel line-ups, we believe that Congressional intent precludes us from simply delaying implementation of must-carry until October 6, 1993.

154. Nevertheless, we believe the public interest would be served by reducing the extent to which adjustments of channel line-ups is necessary during this transitional period. Toward this end, INTV suggests delaying the effective date of the channel positioning rules until October 6, 1993.[406] Under this regime, cable operators would not be required to rearrange their existing channel lineups until October 6, 1993, except to add any broadcast channels required by the must-carry rules. Prior to October 6, 1993, the cable operator would be free to place these added signals anywhere on its basic tier. This could limit the "churn" on cable system channel lineups and concentrate the bulk of channel positioning adjustments at one time, *i.e.*, after October 6, 1993.[407]

155. We are establishing the following schedule for implementing the must-carry and retransmission consent requirements. As of April 2, 1993, cable operators will be required to give subscribers and the affected stations 30 days' notice of deletion or repositioning of any television broadcast station carried. As of May 3, 1993, cable systems must notify qualified noncommercial educational stations of the location of their principal headend[408] and notify local television stations that may not be automatically entitled to must-carry status due to failure to meet signal strength requirements or imposition of increased copyright liability on cable systems.[409] On June 2, 1993, cable systems must begin carriage of their must-carry complement of

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[402] *See* para. 155 *infra*. *See also Notice* at 8066, tentatively concluding that, once the must-carry rules take effect, cable operators must provide local commercial television stations 30 days notice before deleting them. We received little comment on this tentative conclusion and no outright opposition.

[403] We note that the issue of liability only comes up for distant signals and that broadcasters may make their elections at any time, and cable operators and broadcasters may make agreements earlier than the deadline.

[404] *See* paras. 105-110. *supra*.

[405] NCTA Comments at 29-30; TCI Comments at 42-43; Continental Reply at 5; Time Warner Comments at 41-44.

[406] INTV Reply at 31.

[407] Moreover, as noted below, a cable operator electing to move a broadcast station from one channel position to another prior to October 6, 1993 must first give the station and the system's subscribers 30 days prior notice.

[408] See paras. 7-10 *supra*.

[409] *See* para. 31, *supra*.

commercial signals.[410] However, cable operators will not be required to rearrange their systems to conform to the channel positioning rules[411] until October 6, 1993.

156. On June 17, 1993, local television stations will be required to make their initial election of must-carry or retransmission consent status, and stations electing must-carry must notify cable operators of their preferred channel positions. We anticipate that negotiations between cable systems and television broadcast stations regarding channel positioning will be completed by August 1, 1993.[412] The retransmission consent and channel positioning requirements will take effect on October 6, 1993. We believe this schedule will provide an adequate transition period.[413] We note that, in order to effect the transition to retransmission consent and, in particular, to meet the deadlines for notifying stations and subscribers of channel deletions and repositioning, it will generally be necessary for retransmission consent agreements to be concluded well before the October 6, 1993 effective date. We therefore expect that, with limited exceptions, initial retransmission consent agreements will be concluded by early August of 1993. Pursuant to our discussion at paragraph 152, *supra*, of coordinating retransmission consent elections and copyright royalty accounting periods, we determine that subsequent elections will be made by October 1, 1996, October 1, 1999, etc., to be effective January 1, 1997, January 1, 2000, etc.

157. The Act requires that "if there is more than one cable system which services the same geographic area, a station's election shall apply to all such cable systems." Some cable commenters suggest that "geographic area" should be interpreted to mean "ADI market" and, hence, television stations must make the same election for all cable systems in the market.[414] We reject this approach. The legislative history makes it clear that this provision applies to cable systems that compete with one another, *i.e.*, overbuilds. We asked for comment on the extent of overlap necessary to trigger the same-election requirement. One commenter suggests standards based on the number or fraction of households in the overlap area.[415] However, there does not appear to be a principled way of picking an overlap number. Moreover, an important goal of the 1992 Act is encouraging competition and we believe that this should include potential competition. For that reason, we adopt the suggestion by InterMedia Partners that systems with overlapping franchise areas should be considered in the same geographic area.[416] In this manner, not only actual but potential competitors will be placed on a level playing field.[417]

2. The Default Election Procedure

158. Commenters were split with regard to the question of default elections, that is, if a television broadcaster fails to make an election by the prescribed deadline, how is it classified? NAB, CBS, and Westinghouse propose that the default be must carry, while Time-Warner suggests that it be retransmission consent without compensation and NCTA proposes carriage "at the cable operator's discretion."[418] The argument in favor of retransmission consent as a default is that, in a wide range of situations, this is the only possibility. That is, with regard to cable operators outside of the local market and with regard to all non-cable multichannel distributors, broadcast signals cannot be carried except with retransmission consent. A retransmssion consent default could leave the cable operator on the same competitive footing as rival distributors.

159. On the other hand, if a television broadcaster did not bother to make an election, perhaps it would not bother to take the additional action of granting the "express authority" necessary for actual carriage. This could leave a cable operator without any means of acquiring access to a signal for its subscribers. Choosing must-carry as the default would solve this problem. Strong television stations having the potential for gaining retransmission consent revenues would forfeit their negotiating opportunities if they did not make an affirmative election of retransmission consent. Therefore, we believe that making must-carry the default category will give stations incentives to make an affirmative election. Moreover, must-carry can be self-executing; *i.e.*, cable operators can, if necessary, proceed to retransmit a local television signal without interaction with the broadcaster. We therefore decide that local television broadcasters that fail to make an affirmative election between must-carry and retransmission consent by prescribed deadlines will be deemed to have chosen must-carry status.

3. Other Matters

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[410] This approach reflects our belief that Congress intended for must-carry rights to vest promptly after the adoption of our rules and to be in force before the retransmission consent provisions take effect. *See* NAB Comments at 43. Of course, the must-carry provisions for NCE stations set forth in Section 615 of the 1992 Act became effective on December , 1992. Accordingly, cable operators already are required to be carrying their must-carry complement of NCE stations. However, to the extent that the must-carry status of a particular NCE station has been in doubt due to its inability to identify a cable system's principal headend or due to questions concerning its signal strength or copyright liability, our rules will provide a reasonable, yet fairly short, time period for resolution of such issues.

[411] *See* paras. 83-91, *supra*. We recognize that this is not a panacea. It affords cable operators some additional flexibility, but we note that if an operator adds a broadcast signal to a tier that previously had none, the operator's revenue basis for calculating copyright royalties goes up. This limits the benefits to cable operators of this deferral. On the other hand, a wide range of local signals are currently carried by cable operators. The net effect of the new-must carry rules (*e.g.*, use of ADI markets to determine eligibility, no requirement to carry substantially duplicating signals) is not yet clear.

[412] Negotiations should be concluded in sufficient time to permit notification of subscribers of any changes in channel line-ups.

[413] We note that, contrary to NCTA's suggestion, cable operators and broadcasters can discuss carriage rights prior to the broadcasters' election.

[414] *See* NCTA Comments at 26-28, CATA Comments at 21-23.

[415] Malrite Comments at 15-16.

[416] *See* InterMedia Comments at 27-28. *See also* Adelphia Comments at 36-37 (endorsing the franchise area overlap criterion and pointing out that, since elections are made for three-year periods, additional building during a single election "term" could significantly change the amount of actual overlap).

[417] In the event of a truly *de minimis* overlap of franchise areas, interested parties could file special relief petitions.

[418] NAB Comments at 44-45; CBS Comments at 9-10; Westinghouse Reply at 7-8; Time Warner Comments at 48; NCTA Comments at 30.

160. Most commenters agree with our proposal to require television broadcasters to place copies of their election statements in their public files. There was also general agreement that broadcasters should send each cable operator in the station's market a copy of the election statement applicable to that a particular cable operator. Some commenters object, however, to the proposal that a broadcast station send copies of all of its election statements to each cable operator. Information about a station's elections with respect to other cable systems is not necessary for a particular cable system to complete signal carriage arrangements for that station. Moreover, there is no specific requirement in the 1992 Act for broadcast stations to inform each cable operator of their elections with respect to other cable operators. Furthermore, all of a television station's election statements will be in the station's public file, so cable operators will have access to that information. Therefore, we find that television stations are only required to send each cable operator their election statement for that particular cable system.

161. No one commented on our proposal to require new television stations to make their initial must-carry/retransmission consent election within 30 days from the date that they commence regular broadcasts. We also proposed that this initial election would take effect 60 days after it is made. A few commenters addressed this issue, suggesting a 90 day interval.[419] In view of the fact that we have established a 90 day interval between the initial retransmission consent elections of existing stations and the date on which retransmission consent takes effect, we will allow a 90 day interval for the initial elections of new stations to take effect. We also adopt our proposal to require new stations to make initial elections within 30 days after they begin regular broadcasts.

162. The *Notice* at 8068, paragraph 63, raised questions about the limited circumstances in which a television station might be permitted to change its election during a three year period. The Conference Report posited the following example of such a situation: A station elects must-carry status but a cable system does not offer the station carriage pursuant to the must-carry regulations (for example, because the cable operator has already fulfilled its aggregate carriage requirements). If the cable system wishes to carry the station outside the must carry framework, the station then should be able to assert retransmission consent rights.[420] NAB was the only party to address this situation.[421] In addition to endorsing the Conference Report language, NAB suggests that retransmission consent contracts may include provisions by which a station may preserve "its must carry election in the event that a must carry 'slot' becomes available." We believe that Congress intended for stations that elect must-carry but are not carried to assert retransmission consent rights. Moreover, we agree with NAB that stations should be able to bargain with cable systems regarding a wide range of signal carriage bissues.[422] Therefore, agreements such as those described by NAB are permissible.

163. TCI was the only other party to comment on midterm election changes.[423] It cited two instances when such changes might be permitted or required. The first case involves a cable system that changes its technical configuration in such a way as to integrate two formerly separate cable systems. If a television station had previously elected must carry with respect to one and retransmission consent with respect to the other, and if the cable operator had failed to reach a retransmission consent agreement with the station, TCI suggests that the cable operator should be able to require the broadcaster to make a uniform election. We agree, but, since a cable operator will know well in advance that two systems are to become technically integrated, we will require cable operators to give stations 90 days' notice of such an integration. This will allow for the reopening of retransmission consent negotiations. If those negotiations are unsuccessful, the cable operator may, 45 days prior to integration, require a uniform election, to be effective 30 days prior to integration. TCI's other example involves a change in a cable system's market designation. If such a change makes a television station eligible for the first time for must-carry status on the cable system, the station should have the right to make a must-carry election. We agree, provided the new election is made within 30 days of the date that the new market definition takes effect and that the election takes effect 90 days after it is made.

D. Retransmission Consent and Section 614

164. Commenters generally agree that local stations carried pursuant to retransmission consent should count against the must-carry signal complement required. However, there is disagreement about whether the Section 614(b)3(B) requirement to "carry the entirety of the program schedule of any television station carried on the cable system" (subject to Commission rules on sports broadcasting, network nonduplication, and syndicated exclusivity) should apply to retransmission consent stations.

165. We reject our tentative conclusion that cable operators can negotiate with broadcasters and agree not to carry the entirety of the program schedule of retransmission consent stations. We are persuaded by commenters that the plain language of Section 614(b)(3)(B), requiring cable operators to "carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted" applies to retransmission consent stations as well as must-carry stations.

166. While we are aware that the language of the other signal requirements of Section 614(b) is generally limited to signals carried pursuant to Section 614 requirements,[424] the legislative history of Section 614 appears to indicate that Congress did not intend for cable operators to carry partial broadcast signals. The Senate Report, in describing Section 614, notes the requirement that "cable systems carry the entirety of the program schedule of any television stations carried on the cable system, except where FCC rules governing network nonduplication, syndicated exclu-

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419 *See, e.g.*, Tel-Com Comments at 34.
420 Conference Report at 76.
421 NAB Comments at 49-51.
422 Senate Report at 36.
423 TCI Comments at 41-42.
424 However, see paragraph 171 *infra*.

sivity, sports programming, or similar regulations require the deletion of specific programs by a cable system and permit the substitution therefor of other programs."[425]

167. The House bill that went to the Conference Committ

ee included language identical to that adopted in Section 614(b)(3)(B) of the 1992 Cable Act. Commenting on that provision, the House Report states that it "prohibits 'cherry picking' of programs from television stations by requiring cable systems to carry the entirety of the program schedule of television stations they carry, except to the extent that FCC rules intended to preserve local stations' exclusivity rights either permit cable systems to delete individual programs or insert substitutions for programs which cannot be carried on the cable system."[426]

168. Some supporters of the proposition that cable operators may carry less than the complete program schedule of a retransmission consent station point to Section 325(b)(1), which states that multichannel video program distributors may not "retransmit the signal of a broadcasting station, *or any part thereof,*" except with the express authority of the station or pursuant to an election of must carry (emphasis added). We believe, however, that Congress included the emphasized language to provide for instances in which Commission rules (*i.e.*, network nonduplication, syndicated exclusivity, or sports broadcasting) require deletion of some program material.[427]

169. Section 325(b)(4) states that if a television station elects to exercise retransmission consent rights, then "the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system." NAB suggests that "it is logical to construe that provision [Section 325(b)(4)] to apply to the protections Congress established only for must-carry stations, and not section 614(b)(3)(B) which was intended to govern any carriage of a broadcast signal.[428] NAB buttresses its assertion with a reference to the Conference Report. The Conference Committee adopted the Senate provisions on retransmission consent. The House bill had none. In describing the Senate bill, the Conference Report states that "stations which elect to require retransmission consent from a cable system will not have signal carriage rights under sections 614 or 615 on that cable system."[429] NAB asserts that "Section 614(b)(3)(B) does not create any right of signal carriage; instead it limits cable operators' discretion in dealing with signals they do carry, whether under retransmission consent or must carry."[430]

170. We conclude that, subject to the Commission's network nonduplication, syndicated exclusivity, and sports broadcasting rules, cable systems must carry "the entirety of the program schedule" of every television station carried, whether carriage is pursuant to the must-carry rules or pursuant to a retransmission consent agreement.[431] Our finding *infra* at para. 173 regarding the nature of the retransmission consent right is also relevant to this conclusion. As explained *infra*, we have determined that a commercial television station may grant retransmission consent only for the entire signal and not for portions thereof. In other words, entirely apart from Section 614(b)(3)(B), Section 325(b) requires that, if a cable operator acquires any retransmission consent rights from a television station, the rights will be to the entire signal.

171. Because we have rejected our tentative conclusion with regard to the television signals to which Section 614(b)(3)(B) is applicable, we also now review the three other provisions of Section 614(b) whose plain language indicates applicability to more than just television signals carried pursuant to the must-carry rules. Section 614(b)(3)(A) and (b)(4)(A) each refer to "local commercial television stations," and Section 614(b)(9) refers to "a local commercial television station." Using the same "plain language" approach we used in analyzing Section 614(b)(3)(B), we find that these three provisions, in fact, apply to all local commercial television stations carried by a cable system, and not just to must-carry stations.[432]

E. Retransmission Consent Contracts

172. Broadcast and cable commenters generally agree that broadcasters may exercise their retransmission consent rights without permission or interference from the copyright holders of their programs.[433] On the other hand, MPAA asserts that the statutory provision that "[N]othing in this section should be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming licensing agreements between broadcast stations and video programmers" means that those licensing agreements may supersede the new right granted broadcasters by Section 325(b).[434]

173. The legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal, completely separate from the program-

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[425] Senate Report at 85.

[426] House Report at 93.

[427] It is also possible to interpret the prohibitory language of Section 325(b)(1) as designed to preclude claims by cable operators or other multichannel video programming distributors that no retransmission consent is required for carriage of less than the entire signal of a broadcast station. *Compare* 47 U.S.C. §325(a).

[428] NAB Comments at 48.

[429] Conference Report at 76.

[430] NAB Reply at 39.

[431] In view of this decision, and our determination with regard to technical standards, we replace Section 76.62 of our rules with a more comprehensive version.

[432] In our *Notice* at 8068, we asked for comment on how to codify the Section 325(b)(5) provision that retransmission consent stations shall not interfere with or supersede the Section 614 or 615 rights of stations electing must-carry status. We noted that the Conference Report indicates that this provision applies, *inter alia*, to channel positioning negotiations. We received no specific guidance in comments on how to codify this provision. Hence, we shall adopt the statutory language along with the specific example from the Conference Report.

[433] *See*, for example, NAB Comments at 51-54, NCTA Comments at 36-39, CATA Comments at 14-17, Continental Comments at 25-27, CBS Comments at 16-19, Tribune Broadcasting Company (Tribune) Comments at 7-15.

[434] MPAA Comments at 3-4, MPAA Reply at 1-14. For additional support for this position, *see* Cap Cities Comments at 32-37, Viacom Comments at 51-55, Time Warner Comments at 53-59, Fox Comments at 4-7, NBA/NHL Comments at 13-14, Major League Baseball Reply, ASCAP Reply at 2-11.

ming contained in the signal.[435] Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights. INTV suggests that the Commission declare this new right an inalienable right of the broadcaster.[436] Such an interpretation, however, would be inconsistent with Congressional intent. As the Senate Report expressly stated, "[I]t is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals..."[437] Thus, we interpret Section 325 as meaning that the new right may be bargained away by broadcasters in future contracts and conceivably could have been bargained away in some existing contracts. We stress in this regard, however, that retransmission consent is a right created by the Communications Act that vests in a broadcaster's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest. Just as Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal,[438] we intend to maintain that distinction as we implement the retransmission consent rules. Accordingly, we find that broadcasters cannot bargain over retransmission consent rights to individual programs carried via broadcast signals. Any bargaining must be for retransmission consent rights to the entire signal.

174. In this framework, we interpret the statutory provision holding that existing or future licensing agreements are to be unaffected by retransmission consent means that programmers *can* negotiate such limitations with broadcast stations, separate and apart from any copyright arrangements. Again, however, we emphasize that the central issue is whether the parties intended to encumber the broadcaster's rights in the signal created by Section 325(b) of the Communications Act. We agree with the Copyright Office and other commenters[439] that the courts are the proper forum for interpreting and enforcing programmer-broadcaster agreements regarding retransmission consent and for deciding if, in fact, retransmission consent rights have been bargained away in particular contracts.[440]

175. Some commenters suggest that the Commission should assert jurisdiction in the case of a direct violation of its retransmission consent rules, for example, in the event that a multichannel distributor retransmits a television signal and has not obtained consent.[441] Commission intervention in such a situation would be consistent with Section 325(a) precedent and we agree that properly documented retransmission of a television signal without consent would be grounds for imposition of a forfeiture.[442] We note that some multichannel distributors (*e.g.*, satellite carriers and SMATV operators) may not be Commission licensees, and our forfeiture authority is limited in those cases.[443]

F. Reasonableness of Rates

176. Section 325(b)(3)(A) directs the Commission to consider in this proceeding the impact that retransmission consent may have on cable basic service tier rates and to ensure that our retransmission consent regulations do not conflict with our obligation under Section 623(b)(1) "to ensure that the rates for the basic service tier are reasonable." Relatively few commenters address this issue. Broadcast commenters generally agree that the place to ensure that basic rates are reasonable is in the rate regulation rules,[444] and that Congress has given the Commission sufficient flexibility in crafting those rules to accomplish the goal of keeping basic service rates reasonable.[445]

177. On the other hand, the Competitive Cable Associationhadvocates a cap on retransmission consent rates across the board, while the Community Antenna Television Association recommends that the Commission cap rates for small and/or rural systems.[446] While not objecting to the resolution of reasonableness issues in the rate regulation proceeding, Time-Warner asserts that "retransmission consent fees are a direct cost of providing basic service, and thus cable operators must be allowed to recoup these costs."[447] Adelphia asserts that "the Commission... has an affirmative obligation to ensure that retransmission consent terms demanded by broadcasters are not unreasonable," and claims that "the Commission must adopt a policy prohibiting a station from unreasonably refusing to grant retransmission consent."[448]

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[435] *See* Senate Report at 36 ("The Committee is careful to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of the copyright holders in the programming contained on the signal.")

[436] INTV Comments at 18-21. *See also* Acton Comments at 32-34 (contract language is preempted) and Tribune Comments at 11-12 (boilerplate clauses in contracts should be voided so as not to frustrate intent of law).

[437] Senate Report at 36.

[438] *See* NAB Reply at 40.

[439] TCI Comments at 38, NAB Comments at 41-42.

[440] MPAA asserts that, in making these determinations, courts must seek to determine the actual intent of the contracting parties, even when the retransmission consent issue is not explicitly addressed in the contract. MPAA Comments at 4. The Copyright Office does not take a position on what it calls the "more difficult question" of "whether a broadcaster in the absence of a contractual retransmission prohibition (or where such a provision is ambiguous or unclear), must still obtain affirmative copyright owner permission before exercising its section 325(b)(1(A) right." After presenting arguments on both sides, the Copyright Office concludes that "[R]esolution of this issue undoubtably rests with the courts." Copyright Office Comments at 15-16.

[441] *See, e.g.*, Cap Cities Comments at 25.

[442] *See Channel Seven, Inc.*, 3 R.R. 2d 679 (1964), in which the Commission issued a Notice of Apparent Liability for forfeiture in connection with a violation of Section 325(a) by a television station.

[443] The Commission can impose limited forfeiture on non-licensees in certain instances where the party is first notified that the specified behavior violates our rules and the behavior persists. *See* 47 U.S.C. §503(b)(5).

[444] *See Notice of Proposed Rulemaking* in MM Docket No. 92-266, 8 FCC Rcd. 510, 518, n.60 (1992).

[445] *See* NAB Comments at 54, CBS Comments at 19.

[446] Competitive Cable Association Comments at 12-13; CATA Comments at 7-11. The NCTA does not take a position on reasonableness of retransmission consent rates.

[447] Time Warner Comments at 59. *See also* Viacom Comments at 60 ("when the FCC takes those costs |*e.g.*, retransmission consent costs| into account it should permit their full recovery from the basic service rate;" this matter "should be addressed in more detail in the rulemaking proceeding proposing to adopt regulations to implement rate regulation.").

[448] Adelphia Comments at 61-62 (citation omitted).

178. It appears that Congress did not intend that retransmission consent rates be directly regulated. In discussing compensation for retransmission consent, the Senate Report asserts that "it is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."[449] Moreover, while retransmission consent may have an effect on basic service tier rates, the record here provides no evidence that the effect may be significant, no credible analysis suggesting that the effect cannot be dealt with in the rate regulation proceeding, and, hence, no basis for considering such effect in the decisions we make herein. Accordingly, based on the record in this proceeding, we decline to adopt regulations specifically limiting retransmission consent rates here.

G. Other Matters

179. Some commenters urge the Commission to prohibit exclusive retransmission consent agreements, that is, to forbid a television station from agreeing with one multichannel distributor to be carried by it and to deny carriage rights to other multichannel distributors.[450] The Wireless Cable Association supports its argument against exclusive retransmission consent agreements by citing the problems that led Congress to adopt the mandatory program access provisions in the 1992 Cable Act and urges the Commission to "ban cable operators from either securing exclusive agreements with broadcasters or including in retransmission consent agreements provisions that would require the broadcaster to discriminate against emerging competitors with respect to price or any other terms or conditions governing retransmission."[451] The Commission recognizes that exclusivity can be an efficient form of distribution, but, in view of the concerns that led Congress to regulate program access and cable signal carriage agreements, we believe that it is appropriate to extend the same nonexclusivity safeguards to non-cable multichannel distributors with respect to television broadcast signals, at least initially. Accordingly, we will prohibit exclusive retransmission consent agreements between television broadcast stations and cable operators. We will revisit this issue in three years.[452]

180. Several commenters urge us to find that the network nonduplication rules do not apply to stations that elect to exercise retransmission consent rights with respect to a cable system. Indeed, NCTA has filed a Petition for Rulemaking on this topic.[453] The Senate Report on retransmission consent states that

> the Committee has relied on the protections which are afforded local stations by the FCC's network nonduplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted (sic) on cable systems for carriage or (sic) local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12.[454]

It appears that this passage addresses possible substitution on cable systems of distant signals for local ones carrying the same programming. It seems clear that Congress intended that local stations electing retransmission consent should be able to invoke network nonduplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system. We therefore deny the NCTA petition.

181. Section 325(b)(1)(A) prohibits, with limited exceptions, multichannel distributors from retransmitting television broadcast signals without "the express authority of the originating station." While television stations may elect must-carry status with respect to certain cable systems, all non-cable multichannel distributors must have the originating station's consent in order to retransmit its signal starting October 6, 1993. Some commenters suggest that an election of must-carry with respect to a cable system should be deemed to grant retransmission consent at no fee to rival distributors. There is no explicit warrant in the statute for this proposal and we believe that the plain language of the Act, requiring the "express authority" of television broadcast stations, rules it out.

IV. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

182. The Commission's final regulatory flexibility analysis for this *Report and Order* is set forth in Appendix B.

B. Ordering Clauses

183. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Part 76 of the Commission's Rules, 47 C.F.R. Part 76, is AMENDED as set forth in Appendix C.

184. IT IS FURTHER ORDERED that pursuant to the need to avoid disruption to cable subscribers and broadcast television stations during the transition to the new broadcast signal carriage rules and the authority contained in the Administrative Procedure Act, 5 U.S.C. §553(d)(3), Sections 76.58(a) and 76.59 of the rules set forth in Appendix C of this *Report and Order* will be effective April 2, 1993.

185. IT IS FURTHER ORDERED that Sections 76.56 and 76.58(e) of the rules set forth in Appendix C of this *Report and Order* will be effective June 2, 1993.

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[449] Senate Report at 36.

[450] See Bell Atlantic Reply, National Private Cable Association Comments at 6-13.

[451] Wireless Cable Association Comments. *See esp.* at 24.

[452] We are implementing the Cable Act's program access and regulation of carriage agreements sections in a separate proceeding. For purposes of regulating carriage agreements under Section 616, Congress defined the term "video programming vendor" as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. §536(b). Thus, it is possible that Section 616 may apply separately to retransmission consent agreements.

[453] "Petition for Rulemaking of the National Cable Television Association, Inc.," filed Jan.19, 1993. *See also* "Opposition to Petition for Rulemaking of the National Cable Television Association, Inc. to Revise the Network Non-duplication Rules," filed February 8, 1993.

[454] Senate Report at 38.

38. Tele-Communications, Inc.
39. Time Warner Entertainment Company, L.P.
40. Tribune Broadcasting Company
41. Turner Broadcasting System, Inc.
42. TV 14, Inc.
43. United States Telephone Association
44. Viacom International Inc.
45. Westinghouse Broadcasting Company, Inc.
46. WNYC Communications Group0

APPENDIX B
Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. *Need and purpose of this action.* This action is taken to implement the provisions of the Cable Television Consumer Protection and Competition Act of 1992 pertaining to the mandatory carriage of broadcast signals ("must-carry") and retransmission consent.

II. *Summary of issues raised by comments in response to the Initial Regulatory Flexibility Analysis.* No comments were received in response to the request for comments to the Initial Regulatory Flexibility Analysis, however comments received in response to the Notice of Proposed Rule Making indicate that smaller cable systems that primarily serve rural areas are concerned about their ability to compete effectively under the same regulatory scheme as that applied to larger cable systems. Concerns focus generally on the smaller system's ability to financially meet technical requirements and to effectively negotiate for retransmission rights in its market.

III. *Significant alternatives considered and rejected.* None. The Act is specific with regard to the must-carry and retransmission rights available to broadcasters and the resulting obligation on cable systems. The Act provides that rights and obligations are proportionate to the size of the business.

APPENDIX C
Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 -- CABLE TELEVISION SERVICE

1. The Authority Citation for Part 76 is revised to read as follows:

AUTHORITY: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 612, 614-615, 623, 632 as amended, 106 Stat. 1460, 47 U.S.C. §532; Sec. 623, as amended, 106 Stat. 1460; 47 U.S.C. §§532, 533, 535, 543, 552.

2. Section 76.5 is amended by revising paragraph (b) and adding paragraphs (nn), (oo) and (pp) to read as follows:

§ 76.5 Definitions.

* * * * *

(b) *Television station; television broadcast station.* Any television broadcast station operating on a channel regularly assigned to its community by § 73.606 of this chapter, and any television broadcast station licensed by a foreign government: *Provided however,* That a television broadcast station licensed by a foreign government shall not be entitled to assert a claim to carriage, program exclusivity, or retransmission consent authorization pursuant to Subpart D or F of this part, but may otherwise be carried if consistent with the rules on any service tier.

* * * * *

(nn) *Activated channels.* Those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational or governmental use.

(oo) *Usable activated channels.* Those activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations. See Part 76, Subpart K.

(pp) *Principal headend.*

(1) The headend, in the case of a cable system with a zsingle headend or,

(2) In the case of a cable system with more than one headend, the principal headend designated by the cable operator, except that such designation shall not undermine or evade the requirements of subpart D of this Part. The designation of a principal headend shall be made by May 3, 1993, and each cable system shall place in its public file the location of its designated principal headend by June 17, 1993, as provided in §76.302. Except for good cause, an operator may not change its choice of principal headend.

3. Section 76.7 is revised in its entirety to read as follows:

Sec. 76.7 Special relief and must-carry complaint procedures.

(a)(1) *Petitions for special relief.* On petition by a cable television system operator, a franchising authority, an applicant, permittee, or licensee of a television broadcast or translator station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(2) *Complaints filed pursuant to §76.61.* In response to a complaint filed by a television broadcast station under section 76.61 (must-carry complaint), the Commission may order a cable television system operator to commence or resume carriage of the complaining station, or position or reposition the complaining station's channel on the cable television system, pursuant to Subpart D of this Part.

(b) The petition for special relief or must-carry complaint may be submitted informally, by letter, but shall be accompanied by a certificate of service on any cable televi-

sion system operator, franchising authority, station licensee, permittee, or applicant, or other interested person who may be directly affected if the relief requested is granted.

(c)(1) The petition for special relief or must-carry complaint shall state the relief requested. It shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, tand exhibits shall be verified by the person who prepares them.

(2) A petition for special relief or must-carry complaint shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(3) An original and two (2) copies of the petition for special relief or must-carry complaint, and all subsequent pleadings shall be filed in accordance with §0.401(a) of the Commission's rules, except that petitions for special relief requiring fees as set forth at Part 1, Subpart G of this chapter must be filed in accordance with §0.401(b) of the rules. Must-carry complaints filed pursuant to § 76.61 are not covered by Part 1, Subpart G of this chapter and do not require fees.

(4)(i) Must-carry complaints filed pursuant to §76.61(a) (Complaints regarding carriage of local commercial television stations) shall be accompanied by the notice from the complainant to the cable television system operator (§76.61(a)(1)), and the cable television system operator's response (§76.61(a)(2)), if any. If no timely response was received, the complaint should so state.

(ii) Must-carry complaints filed pursuant to §76.61(b) (Complaints regarding carriage of qualified local NCE television stations) should be accompanied by any relevant correspondence between the complainant and the cable television system operator.

(iii) No must-carry complaint filed pursuant to §76.61 will be accepted by the Commission if filed more than sixty (60) days after the date of the specific event described in this paragraph. Must-carry complaints filed pursuant to §76.61(a) or §76.61(b) should affirmatively state the specific event upon which the complaint is based, and shall establish that the complaint is being filed within sixty (60) days of such specific event. With respect to must-carry complaints filed pursuant to §76.61(a), the specific event shall be

(A) The denial by a cable television system operator of a request for carriage or channel position contained in the notice required by §76.61(a)(1), or (B) The failure to respond to such notice within the time period allowed by §76.61(a)(2). With respect to must-carry complaints filed pursuant to §76.61(b), the specific event shall be when the complainant first believes that the cable television system operator has ufailed to comply with the applicable provisions of Subpart D of this Part.

(d) Interested persons may submit comments or oppositions to a petition for special relief or a must-carry complaint within twenty (20) days after the date of public notice of the filing of such petition or complaint. For good cause shown in the petition for special relief or must-carry complaint, the Commission may, by letter or telegram to known interested persons, specify an altered time for such submissions. Comments or oppositions shall be served on the petitioner or complainant and on all persons listed in petitioner's or complainant's certificate of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied on.

(e) The petitioner or complainant may file a reply to the comments or oppositions within ten (10) days after their submission, which shall be served on all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied on. For good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of a petition for special relief and the responsive pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission will resolve must-carry complaints pursuant to paragraphs (a)(4) and (b)(2) of Section 76.61. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party pending the hearing and the nature of any such temporary relief.

(g) On a finding that the public interest so requires, the Commission may determine that a system community unit operating or proposing to operate in a community located outside of the 48 contiguous states shall comply with provisions of Subparts D, F, and G of this part in addition to the provisions thereof otherwise applicable.

Note: Each party filing a petition, comments, opposition or other pleading pursuant to Sec. 76.7 is responsible for the continuing accuracy and completeness vof all information in such document. The provisions of Sec. 1.65 of this chapter are wholly applicable to pleadings involving Sec. 76.7, except that where specific provisions of the latter conflict with the former, the specific provisions of Sec. 76.7 are controlling, e.g., where requirements for service on specified parties of certain information may vary.

4. Section 76.51 is amended by revising the names of markets ranked numbers 18, 19 and 27, and by adding a note at the end of the section, to read as follows:

§ 76.51 Major television markets.

* * * * *

(18) Atlanta-Rome, Ga.

(19) Hartford-New Haven-New Britain-Waterbury-New London, Ct.

* * * * *

(27) Columbus-Chillicothe, Ohio

* * * * *

Note: Requests for changes to this list shall be made in the form of a petition for rulemaking pursuant to § 1.401 of this chapter, except that such petitions shall not be subject to the public notice provisions of § 1.403 of this chapter.

5. Section 76.55 is added to Subpart D to read as follows:

§ 76.55 Definitions applicable to the must-carry rules.

For purposes of the must-carry rules set forth in this subpart, the following definitions apply:

(a) *Qualified noncommercial educational (NCE) television station.* A qualified NCE television station is any television broadcast station which

(1)(i) Under the rules and regulations of the Commission in effect on March 29, 1990, is licensed by the Commission as an NCE television broadcast station and which is owned and operated by a public agency, nonprofit foundation, corporation, or association; and

(ii) Has as its licensee an entity which is eligible to receive a community service grant, or any successor grant thereto, from the Corporation for Public Broadcasting, or any successor organization thereto, on the basis of the formula set forth in Section 396(k)(6)(B) of the Communications Act of 1934, as amended; or

(2) Is owned and operated by a municipality and transmits noncommercial programs for educational purposes, as defined in Section 73.612 of this chapter, for at least 50 percent of its broadcast week.

(3) This definition includes

(i) The translator of any NCE television station with five watts or higher power serving the franchise area,

(ii) A full-service station or translator if such station or translator is licensed to a channel reserved for NCE use pursuant to Section 73.606 of the rules, or any successor regulations thereto, and

(iii) Such stations and translators operating on channels not so reserved but otherwise qualified as NCE stations.

(b) *Qualified local noncommercial educational (NCE) television station.* A qualified local NCE television station is a qualified NCE television station:

(1) That is licensed to a community whose reference point, as defined in Section 76.53 is within 50 miles of the principal headend, as defined in Section 76.5(pp), of the cable system; or

(2) Whose Grade B service contour encompasses the principal headend, as defined in Section 76.5(pp), of the cable system.

(c) *Local commercial television station.* A local commercial television station is any full power television broadcast station, other than a qualified NCE television station as defined in paragraph (a) of this section, licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market, as defined below in paragraph (e) of this section, as the cable system, except that the term local commercial television station does not include:

(1) Low power television stations, television translator stations, and passive repeaters which operate pursuant to Part 74 of the rules.

(2) A television broadcast station that would be considered a distant signal under the cable compulsory copyright license, 17 U.S.C. § 111, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or

(3) A television broadcast station that does not deliver to the principal headend, as defined in Section 76.5(pp), of a cable system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, *i.e.*, the input to the first active component of the signal processing equipment relevant to the signal at issue, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

(d) *Qualified low power station.* A qualified low power station is any television broadcast station conforming to the low power television rules contained in Part 74 of the rules, only if:

(1) Such station broadcasts for at least the minimum number of hours of operation required by the Commission for full power television broadcast stations under Part 73 of the rules;

(2) Such station meets all obligations and requirements applicable to full power television broadcast stations under Part 73 of this chapter, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license;

(3) Such station complies with interference regulations consistent with its secondary status pursuant to Part 74 of this chapter;

(4) Such station is located no more than 35 miles from the cable system's principal headend, as defined in Section 76.5(pp), and delivers to that headend an over-the-air signal of good quality;

(5) The community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on such date did ynot exceed 35,000; and

(6) There is no full power television broadcast station licensed to any community within the county or other equivalent political subdivision (of a State) served by the cable system.

(e) *Television market.* For purposes of the must-carry rules:

(1) A local commercial broadcast television station's market shall be defined as its Area of Dominant Influence (ADI) as determined by Arbitron and published in its *Television ADI Market Guide* or any successor publication, except that for areas outside the contiguous 48 states the area of dominant influence may be defined using Nielsen's Designated Market Area (DMA), where applicable, and that Puerto Rico, the U.S. Virgin Islands and Guam will each be considered one ADI;

(2) A cable system's television market(s) shall be the one or more ADIs in which the communities it serves are located;

(3) In addition, the county in which a station's community of license is located will be considered within its market.

Note: For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the 1991-1992 *Television ADI Market Guide* will apply. ADI assignments will be updated at three year intervals. For the 1996 election period, the 1994-1995 ADI list will be used; the applicable list for the 1999 election will be the 1997-1998 list, etc.

(f) *Network.* For purposes of the must-carry rules, a commercial television network is an entity that offers programming on a regular basis for 15 or more hours per week to at least 25 affiliates in 10 or more states.

6. Section 76.56 is added to Subpart D to read as follows:

§ 76.56 Signal carriage obligations.

(a) *Carriage of Qualified Noncommercial Educational Stations.* A cable television system shall carry qualified NCE television stations in accordance with the following provisions:

(1) Each cable operator shall carry on its cable television system any qualified local NCE television station requesting carriage, except that

(i) Systems with 12 or fewer usable activated channels, as defined in Section 76.6(oo), shall be required to carry the signal of one such station;

(ii) Systems with 13 to 36 usable activated channels, as defined in Section 76.5(oo), shall be required to carry at least one qualified local NCE station, but not more than three such stations; and

(iii) Systems with more than 36 usable activated channels shall be required to carry the signals of three qualified local NCE educational television stations; however a cable system with more than 36 channels shall not be required to carry stations whose programming substantially duplicates the programming of another qualified local NCE station.

Note: For purposes of this paragraph, a station will be deemed to "substantially duplicate" the programming of another station if it broadcasts the same programming, simultaneous or non-simultaneous, for more than 50 percent of prime time, as defined in Section 76.5(n), and more than 50 percent outside of prime time over a three month period.

(2)(i) In the case of a cable system with 12 or fewer channels that operates beyond the presence of any qualified local NCE stations, the cable operator shall import one qualified NCE television station.

(ii) A cable system with between 13 and 36 channels that operates beyond the presence of any qualified local NCE stations, the cable operator shall import at least one qualified NCE television station.

(3) A cable system with 12 or fewer usable activated channels shall not be required to remove any programming service provided to subscribers as of March 29, 1990, to satisfy these requirements, except that the first available channel must be used to satisfy these requirements.

(4) A cable system with 13 to 36 usable activated channels which carries the signal of a qualified local NCE station affiliated with a State public television network shall not be required to carry more than one qualified local NCE station affiliated with such network, if the programming of such additional stations substantially duplicates, as defined in the note in paragraph (a)(1) of this section, the programming of a qualified local NCE television station receiving carriage.

(5) Notwithstanding the requirements of paragraph (a)(1) of this section, all cable operators shall continue to provide carriage to all qualified local NCE television stations whose signals were carried on their systems as of March 29, 1990. This requirement may be waived with respect to a particular cable operator and a particular NCE station, upon the written consent of the cable operator and the station.

(b) *Carriage of Local Commercial Television Stations.* Effective June 2, 1993, a cable television system shall carry local commercial broadcast television stations in accordance with the following provisions:

(1) A cable system with 12 or fewer usable activated channels, as defined in Section 76.5(oo), shall carry the signals of at least three local commercial television stations, except that if such system had 300 or fewer subscribers on October 5, 1992, it shall not be subject to these requirements as long as it does not delete from carriage any broadcast television station.

(2) A cable system with more than 12 usable activated channels, as defined in Section 76.(oo), shall carry local commercial television stations up to one-third of the aggregate number of usable activated channels of such system.

(3) If there are not enough local commercial television stations to fill the channels set aside under paragraphs (b)(1) and (b)(2) of this section, a cable operator of a system with 35 or fewer usable activated channels, as defined in Section 76(oo), shall, if such stations exist, carry one qualified low power television station and a cable system with more than 35 usable activated channels shall carry two qualified low power stations.

(4) Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (b)(1) or (b)(2) of this section, the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that

(i) Under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

(ii) If the cable operator elects to carry an affiliate of a broadcast network, as defined in Section 76.55(f) of the rules, such cable operator shall carry the affiliate of such broadcast network whose community of license reference point, as defined in Section 76.53 of the rules, is closest to the principal headend, as defined in Section 76.5(pp), of the cable system.

(5) A cable operator is not required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station that is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network, as defined in Section 76.55(f). However, if a cable operator declines to carry duplicating signals, such cable operator shall carry the station whose community of license reference point, as defined in Section 76.53 of the rules, is closest to the principal headend of the cable system. For purposes of this paragraph, substantially duplicates means that a station regularly simultaneously broadcasts the iden-

tical programming as another station for more than 50 percent of the broadcast week. For purposes of this definition, only identical episodes of a television series are considered duplicative and commercial inserts are excluded from the comparison. When the stations being compared are licensed to communities in different time zones, programming aired by a station within one hour of the identical program being broadcast by another station will be considered duplicative.

(6) A cable operator is not required to carry on any tier, and is not prohibited from carrying on any tier, the signal of any commercial television station whose programming week consists of more than 50 percent sales presentations or program length commercials.

(c) *Use of public, educational, or governmental (PEG) channels.* A cable operator required to carry more than one signal of a qualified low power station or to add qualified local NCE stations in fulfillment of these must-carry obligations may do so, subject to approval by the franchising authority pursuant to Section 611 of the Communications Act of 1934, as amended, by placing such additional station on public, educational, or governmental channels not in use for their designated purposes.

(d) *Availability of signals.*

(1) Local commercial television stations carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection.

(2) Qualified local NCE television stations carried in fulfillment of the carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system's lowest priced service tier that includes the retransmission of local commercial television broadcast signals.

(3) If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers. Such notification must be provided by June 2, 1993, and annually thereafter and to each new subscriber upon initial installation. The notice, which may be included in routine billing statements, shall identify the signals that are unavailable without an additional connection, the manner for obtaining such additional connection and instructions for installation.

(e) *Identification of must-carry signals.* A cable operator shall respond in writing within 30 days to any written request by any person for the identification of the signals carried on its system in fulfillment of the requirements of this section. Pursuant to Section 76.302, a cable operator must place a list of the broadcast television signals carried in fulfillment of these must-carry obligations in its public file.

(f) Carriage of additional broadcast television signals on such system shall be at the discretion of the cable operator, subject to the retransmission consent rules, Section 76.64. A cable system may also carry any ancillary service transmission on the vertical blanking interval or the aural baseband of any television broadcast signal, including, but not limited to, multichannel television sound and teletext.

7. Section 76.57 is added to Subpart D to read as follows:

§76.57 Channel positioning.

(a) At the election of the licensee of a local commercial broadcast television station carried in fulfillment of the must-carry obligations, a cable operator shall carry such signal on the cable system channel number on which the local commercial television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, or on the channel on which it was carried on January 1, 1992.

(b) At the election of the licensee of a qualified local NCE broadcast television station carried in fulfillment of the must-carry obligations, a cable operator shall carry such signal on the cable system channel number on which the qualified NCE television station is broadcast over the air, or on the channel on which it was carried on July 19, 1985.

(c) Any signal carried in fulfillment of the must-carry obligations may be carried on such other channel number as is mutually agreed upon by the station and the cable operator.

(d) At the time a local commercial station elects must-carry status pursuant to Section 76.64, such station shall notify the cable system of its choice of channel position as specified in paragraphs (a)-(c) of this section. A qualified NCE stations shall notify the cable system of its choice of channel position when it requests carriage. Channel positioning requests from local commercial stations shall be fulfilled by the cable operator no later than October 6, 1993.

Note: Any existing agreement for channel position between a local commercial station entitled to must-carry status and a cable operator entered into prior to June 26, 1990, may continue through the expiration of such agreement.

8. Section 76.58 is added to Subpart D to read as follows:

§ 76.58 Notification.

(a) Effective April 2, 1993, a cable operator shall provide written notice to any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station. Such notification shall also be provided to subscribers of the cable system.

Note: No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods -- generally including February, May, July and November -- commonly known as audience sweeps.

(b) By May 3, 1993, a cable operator must notify all qualified NCE stations of its designated principal headend by certified mail.

(c) A cable operator shall provide written notice by certified mail to all stations carried on its system pursuant to the must-carry rules at least 60 days prior to any change in the designation of its principal headend, and shall include the new designation in its public file.

(d) By May 3, 1993, a cable operator must notify all local commercial and NCE stations that may not be entitled to carriage because they either

(1) Fail to meet the standards for delivery of a good quality signal to the cable system's principal headend or

(2) May cause an increased copyright liability to the cable system.

(e) By June 2, 1993, a cable operator must send by certified mail a copy of a list of all broadcast television stations carried by its system and their channel positions to all local commercial and noncommercial television stations, including those not designated as must-carry stations and those not carried on the system.

9. Section 76.59 is added to Subpart D to read as follows:

§ 76.59 Modification of television markets.

(a) The Commission, following a written request from a broadcast station or a cable system, may deem that the television market of a particular commercial television broadcast station should include additional communities within its television market or exclude communities from such station's television market. In this respect, communities may be considered part of more than one television market.

(b) Such requests for modification of a television market shall be submitted in accordance with Section 76.7 of the rules, petitions for special relief.

(c) A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this section.

10. Section 76.60 is revised in its entirety to read as follows:

§ 76.60 Compensation for carriage.

A cable operator is prohibited from accepting or requesting monetary payment or other valuable consideration in exchange either for carriage or channel positioning of any broadcast television station carried in fulfillment of the must-carry requirements, except that

(a) Any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system; or

(b) A cable operator may accept payments from stations which would be considered distant signals under the cable compulsory copyright license, 17 U.S.C. § 111, as indemnification for any increased copyright liability resulting from carriage of such signal.

Note: A cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the must-carry requirements, through, but not beyond, the date of expiration of an agreement between a cable operator and a local commercial television station entered into prior to June 26, 1990.

11. Section 76.61 is added to Subpart D to read as follows:

§ 76.61 Disputes concerning carriage.

(a) *Complaints regarding carriage of local commercial television stations.*

(1) Whenever a local commercial television station or a qualified low power television station believes that a cable operator has failed to meet its carriage or channel positioning obligations, pursuant to Sections 76.56 and 76.57 of the rules, such station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signal of such station or position such signal on a particular channel.

(2) The cable operator shall, within 30 days of receipt of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of the must-carry rules. If a refusal for carriage is based on the station's distance from the cable system's principal headend, the operator's response shall include the location of such headend. If a cable operator denies carriage on the basis of the failure of the station to deliver a good quality signal at the cable system's principal headend, the cable operator must provide a list of equipment used to make the measurements, the point of measurement and a list and detailed description of the reception and over-the-air signal processing equipment used, including sketches such as block diagrams and a description of the methodology used for processing the signal at issue, in its response.

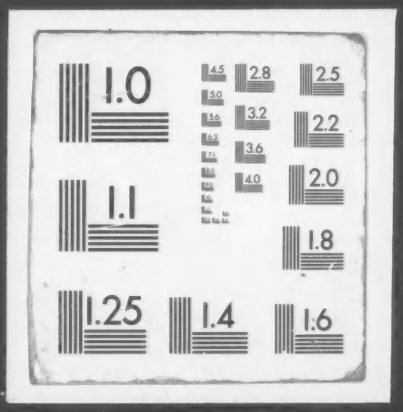
(3) A local commercial television station or qualified low power television station that is denied carriage or channel positioning or repositioning in accordance with the must-carry rules by a cable operator may file a complaint with the Commission in accordance with the procedures set forth in Section 76.7 of the rules relating to must-carry complaints. In addition to the requirements of Section 76.7, such complaint shall specifically allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

(4) If the Commission determines that a cable operator has failed to meet its must-carry obligations, the Commission shall order that, within 45 days of such order or such other time period as the Commission may specify, the cable operator reposition the complaining station or, in the case of an obligation to carry a station, commence or resume carriage of the station and continue such carriage for at least 12 months. If the Commission determines that the cable operator has fully met the must-carry requirements, it shall dismiss the complaint.

(b) *Complaints regarding carriage of qualified local NCE television stations.*

(1) Whenever a qualified local NCE television station believes that a cable operator has failed to comply with the signal carriage or channel positioning requirements, pursuant to Sections 76.56-76.57, the station may file a complaint with the Commission in accordance with the procedures set forth in Section 76.7 of the rules. In addition to the requirements of Section 76.7, such complaint shall specifically allege the manner in which such cable operator has failed to comply with such requirements and state the basis for such allegations.

(2) If the Commission determines that a cable operator has failed to meet its must-carry obligations, the Commission shall order that, within 45 days of such order or such other period as the Commission may specify, the cable operator reposition the complaining station or, in the case of an obligation to carry a station, commence or resume carriage of the station and continue such carriage for a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